

# **The Foundations of Conduct Regularity**

Legal Theory from a Hayekian Perspective

by

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**Declaration**

This thesis has been composed by the myself and is my own work.



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# Introduction

## 1. An overview

This thesis attempts to bring about a shift in the perspective of legal theorizing. This shift is a subtle but significant one, and leads one in directions somewhat different from that of traditional legal theory. Given that this is the case, it is incumbent upon this introduction to present, in as clear a manner as possible, an overview of the theoretical landscape so that the reader is clear about the terrain to be covered.

This thesis focuses on the *minimal foundations* of law, legal systems, and legal theory. Legal theories are often content to simply presuppose that certain pre-conditions must be satisfied if law and legal systems are to be said to exist. These pre-conditions are then investigated as if they were a simple matter of “(social) fact”. The foundations of these pre-conditions, however, often remain uninvestigated. This thesis examines one essential pre-condition, and studies in some detail what this pre-condition is, how it comes about, and how it is sustained. To be specific, this thesis focuses on the foundations of conduct regularity, the existence of which typically enters other legal theories as a matter of “(social) fact”. Such an examination necessitates a shift of perspective in two related directions. First, there is a move away from the examination of institutional forms, and a move towards the analysis of their foundations. Second, and associated with this, there is a shift towards individual-level analysis. Indeed, much of this thesis may be considered to be an investigation of how a single individual, embedded in a social environment, would attempt to conduct themselves in a regular way. Connected with both of these shifts in perspective is the important point that this thesis examines the *mechanisms* by which “ordinary” individuals conduct themselves with regularity in their day to day affairs, and does not focus primarily upon institutional actors playing out institutional roles.

## 2. Implications of the shift in perspective

This shift in perspective entails a variety of consequences. First, there is a move away from examining the institutional creation and application of rules, and a move towards the examination of how regularity comes to exist and is manifested in individual conduct. This may be contrasted with the positivist approach to the matter. This work argues that positivism is confused on a number of points, not least in that its starting point for rule-generation is, crudely speaking, a pre-existing authority. In contrast, the theory laid out in this work focuses on how authority comes to exist, how rules, in the sense of regularities,<sup>1</sup> are generated, and the interaction between these regularities and the positivists' notion of authority. One might put it this way: the difference between the positivist approach and the one of this thesis is related to the interest each perspective has in conduct regularity. I shall argue that while the positivist approach is interested in conduct regularity insofar as it enters as a factual pre-condition for the existence of law and legal systems, they have little interest or insight into *how* this regularity comes to exist or is sustained. The focus of this thesis, on the other hand, is on the mechanisms which support regularities of conduct, and hence into the inter-relationship between these mechanisms, conduct regularity, and the existence and functioning of authority. In other words, the starting point of each approach is different: what enters into positivist analyses as "givens" (as "social facts" which either do or do not exist) enters into the analysis of this thesis as questions to be answered about *how* they come to exist, and what supports their continued existence.

One consequence of this difference in interests is that the term "rules" has a somewhat different meaning from traditional positivist usage. This term, as used within this thesis, refers in many cases to regularities of conduct. In addition, it is not assumed that authority is a defining property of a "rule". This thesis attempts to shift the emphasis away from deliberate, institutionalized and authoritative rule creation, and towards less deliberate and often times unarticulated regularities. This shift is accompanied by a change of emphasis on the type of reasoning which comes under examination. The focus of this thesis is not upon reasoning within institutions already assumed to be authoritative, nor is its emphasis on the deliberate and articulated arguments concerning issues of authority which are held to be of great importance in such a sphere, but rather is instead upon individual-level reasoning and

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<sup>1</sup> It is important to keep in mind that in this thesis the term "rule" does not necessarily refer to an authoritative regularity, nor to an articulated one.

autonomous conduct governance, and upon “reasoning” which is in some cases neither deliberate nor articulated.

This leads to a second difference between this study and those with an institutional emphasis. One question of interest is *why* regularities of conduct have arisen, and what properties have come to be associated with them. An emphasis upon rule-generation which is in many cases neither deliberate nor articulated leads to a stress upon two properties of rules which are often underemphasized by an institutional perspective: their abstractness and their negativity (in the sense of being prohibitive). Within the context of this thesis these properties will be analyzed as evolutionary adaptations to conditions of environmental complexity. Such properties are of fundamental importance when one turns to issues of conflict-resolution in complex environments.

The third point of difference from traditional inquiries is that this thesis emphasizes two inter-related aspects of conflict-resolution. First, there is the problem of resolving conflicts which individuals have within *themselves*. This fundamentally difficult problem is often overlooked in institutional studies of law, yet it is neither trivial nor unrelated to institutional conflict-resolution. This thesis argues that institutional mechanisms for conflict-resolution must solve many of the same difficulties faced by individual decision-makers when deciding over their own conduct. In an important sense, individuals striving for regularity put into effect what is typically considered to be a principle applicable only to social institutions — the principle of the Rule of Law. From this analogy between different levels of conduct governance flows an argument that conflict-resolution at the individual level provides, in a sense, the foundations of more institutionalized forms, and that it is therefore of great importance to understand the relationship between individual-level governance and more institutional methods. To do this, this thesis argues that one must first understand how individuals govern *themselves*.

### **3. The critical dimension: the contrast with Hartian legal positivism**

All of this differs from the approach typically taken by traditional legal theory. This thesis examines a dominant branch of this tradition, Hartian legal positivism. Hartians are representative of traditional legal theory in that they leave the foundations of social order



and legal authority unexamined.<sup>2</sup> Hartian theory, as with many others, makes a leap into institutional detail without an examination or understanding of the foundations upon which such institutions are grounded. This lack of interest in, and understanding of, the foundations of legal theory might in part explain their pre-occupation with *authority*. Hartians assume a foundation of conduct regularity and authority are necessary conditions for the existence of law and legal systems. Yet they offer little insight into how such regularity *comes* to exist, nor into the requirements for its sustainability, nor into the interaction of this regularity with the elaborate theoretical and institutional structures upon which they are so fond of focusing. The lack of insight into the foundations of regularity and authority is manifested in their assertions of the existence of certain “social facts” and the factual nature of their inquiries. In reality, however, this premature factuality merely serves to eliminate insights into the foundations upon which positivist legal theory rests. Positivism simply requires regularity to exist as a fact, and does not inquire into the sources of this regularity. The same can be said for their view of authority. Legal positivism’s theoretical analysis is *conditional upon* the continued existence of the “social facts” of regularity and authority. Yet little explanation is given of how these phenomena persist, and there is little mention made of the conditions under which the factuality of such assumptions becomes questionable. This is not to say that positivists do not question *why* individuals conduct themselves with regularity, for the positivists *are* insistent that the *reasons* why individuals conform to their notion of legal rules are multifarious. The questions which are not asked, however, are *how* individuals come to act regularly in the first instance, and whether the diversity which one finds in the *reasons* for acting regularly extends over to the *mechanisms* by which such regularity is generated and sustained.

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<sup>2</sup> There is one potential misunderstanding of the argument of this thesis which must be averted. This is the belief that this work is arguing that positivists do not understand the nature of authority or have made no investigations into its nature. This would not be an argument made by this thesis. Positivists — and in particular, Joseph Raz (1975; 1979; 1980; 1994) — are indeed very interested in the *nature* of authority, and have made substantial contributions in this area. However, these studies tend to restrict their focus to what authority *is*, i.e. “what it is to have authority or to be in authority” (Raz 1979, 5). This thesis, on the other hand, may be viewed as an investigation into the pre-conditions which are necessary for the *existence* of authority. It is important to be clear on this point. Thus, it is *not* one of the aims of this thesis to examine the “conditions that are in fact either necessary or sufficient for holding...authority” (Raz 1979, 5), in that the aim of the thesis is not to investigate the conditions under which particular individuals or groups come to *hold* authority, but rather to examine the pre-conditions for the *existence* of authority. This is a subtle difference, but one of the utmost importance, for while the former implicitly assumes that authority exists and is concerned to investigate the conditions under which it becomes connected to particular individuals or groups, the latter focuses on the pre-conditions which must exist for there to be any authority at all. Thus, the argument of this work is that positivists have not devoted attention to the *foundations* of authority, and in particular its dependence on conduct regularity.

One manifestation of this blindspot to the foundations of social and legal systems is the positivist insistence that law and legal systems exist as a “social fact”. This social fact is then contrasted with yet another: the existence of morality. Conflicts between these two social facts are then examined in some detail, with the emphasis being on the separation of “what is the case” and “what ought to be the case”. Lost in the shuffle, however, is any investigation into the pre-conditions for the existence of law and morality. How is it, then, that these come to exist? Do they only flower in certain circumstances? And how are they preserved? These questions are not considered by legal positivism because of its insistence that the existence of law is a matter of fact, not value. What positivism lacks, however, is any insight into the more complex relationship which exists between potentiality, normativity, and actuality.

Connected to this are positivist arguments relating to the principle of the Rule of Law. Again, this is viewed solely as an institutional feature, and further, as an exclusively normative principle. Positivists are adamant in their view that law and legal systems can exist even if they do not conform in the slightest degree to this principle.<sup>3</sup> What remains unquestioned, however, is the relationship between this principle and the foundations of regularity and authority upon which legal positivism builds its elaborate theoretical structures. Once again, positivism’s focus upon the relationship between the “is” and the “ought” blinds it to the relationship between the “could”, the “is” and the “ought”.

The positivists’ theoretical blindspot to the foundations of legal order has several other significant consequences. Hartian legal positivists tend to focus upon institutional structure and ignore the foundations upon which it rests. This focus on institutions, and institutional officials and their authority, tends to blind Hartian positivists to the interactive effects which arise between these institutions and their own foundations. In effect, Hartian legal theorists detach the authority of a legal system and its officials from the wider sphere of social authoritativeness and its foundations in social regularity. Hartians tend to ask the question of whether certain acts were authorized, without considering the interactive effects *between* these acts and their authority. In effect, then, positivists treat legal authority as if it were separated — as if it were autonomous — from its environment. It is the regularity of the conduct of legal officials and their acts of recognizing authority which are the focus of attention for Hartian positivists. What they fail to take into consideration are the

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<sup>3</sup> See, for example, Raz (1979, 211).

consequences of acts which are “authorized” within legal spheres both upon individual conduct regularity more widely considered and upon the foundations of legal authority itself. The positivist idea is one of “free-floating” legal authority, unconnected to more encompassing, more foundational, and more widely-shared forms of authority, existing as a “social fact”. Positivists are thus unable to consider how the authority of the legal system might be undermined by feedback effects flowing from the acts of the legal system itself.

This idea of autonomous authority, which flows from a lack of understanding of the pre-conditions for law, legal systems and authority, raises further questions. Consider two of these. First, how is legal authority to be differentiated from other forms of institutional authority — from political authority, for example? Positivists hold that legal officials are the ones who delineate the boundaries of the legal sphere, yet they provide no criteria for identifying these officials in the first instance. To a positivist, the “legal quality” flows from acting with legal authority. The question, however, is what constitutes the difference between legal authority and other institutional forms. Hartian positivists’ view of the matter is that what is required is a bedrock of social conduct regularity (termed “efficacy”) and regular acts of authority recognition by legal officials. What this does not answer, however, is how legal officials are to be identified and distinguished from other institutional actors and hence what differentiates the acts of these actors from the acts of others.

This leads to a second question. If one were describing the positivist notion of legal order in general terms, one might be inclined to say that it consists of the conformity of one group to the acts which are institutionally recognized as authoritative by another. How, then, does this differ from the order imposed by a gang of thugs onto unwilling individuals? Presumably, the thugs might have a shared notion of what it is they consider to be authoritative, which they might be able to institutionally enforce conformity to these notions. Is this, then, a legal order? And what of a military organization? Might not a military body have a shared notion of what is authoritative, and might they not be able to institutionally enforce conformity to this? Is this legal order? And if so, what is it that distinguishes this form of order as *specifically* legal?

These two questions manifest the implicit implications of the positivist presuppositions. It is perhaps useful to consider the consequences of extending these two implications a bit further. Consider one path, and extend the emphasis on the autonomy of a legal system. On this view, one might choose to focus on the self-referentiality of legal systems, and their independence and autonomy from the environments in which they are embedded. Under this



view, the circular nature of legal authority is not profoundly worrisome, for in advanced social systems with a complex division of labour and knowledge, such circularity should be expected. Closed off from its environment, the legal system “validates” its own authority through self-referential acts.

Now consider a second path, and extend the perspectivist aspects of the positivist presuppositions. An emphasis on perspective comes from the insight that positivist legal theory has often emphasized the point of view of legal officials, often to the exclusion of those that are governed by the law. Once one turns to a consideration of the latter perspective, it is quite natural to place an emphasis on the power aspects of law. That this follows becomes clear when one realizes that under the positivist theory of law, only legal officials need consider law to be authorized in the sense of imposing justified standards of acceptable conduct. From the perspective of those being imposed *upon*, there is no such authority. Such a situation is one in which one group is imposing its own standards of acceptable conduct onto another group that does not consider such standards as justified or, put differently, it is a situation in which one group exerts its unjustified *power* over another. On this way of looking at it, legal authority is simply power by another name (i.e. from another perspective, the perspective of the oppressed).

This is where the presuppositions of positivism lead legal theory. A view which stresses the authority of some over others, without the authorization of those that are imposed upon, and which stresses the lack of any foundation shared among “ordinary” individuals, for the authority of law, leads quite naturally to the position that either legal authority is self-authorizing, or it is not authorized at all. Underlying all of this (though it is only implicit and inchoate) is the idea that shared values do not exist — there are no “meta-narratives”<sup>4</sup> — and that the world in which we live is one in which value fragmentation has taken place to such a degree that there are no longer *any* shared values. Positivism’s presuppositions, and the perspective they engender, lead to the denial of society-wide criteria of authorization, and a stress upon the autonomy of law and legal officials. This in turn has two related implications: that law becomes increasingly indistinguishable from other forms of institutional authority and, in societies in which shared values do not exist, law becomes just another form of power.

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<sup>4</sup> A term borrowed from Lyotard (1984, xxiv).

#### 4. The constructive dimension: a reformulation of Hayekian jurisprudence

This thesis takes a different approach. It argues that legal theory can profit from incorporating some of the insights present in the central themes of the work of F.A. Hayek. It should be noted, however, that the contents of the chapters that follow are not restricted to Hayek's theorizing. Instead, an attempt is made to integrate the insights of other thinkers — such as Adam Smith and Lon Fuller — into what might be called a Hayekian approach to legal theory. That is, an approach based on the general themes of Hayek's work but not restricted exclusively to them.

Given that this is the case, one might think that this thesis would build upon the analysis of prominent authors in the literature on Hayek, and in particular the two most noteworthy studies in the area: John Gray's *Hayek on Liberty* (1986), and Chandran Kukathas' *Hayek and Modern Liberalism* (1989).<sup>5</sup> Now, although these studies do make many useful insights into Hayek's work and present many important arguments, for the most part their analyses do not form the foundation upon which the chapters of this work will build. However, some mention must be made of the reasons why this is the case.

The first reason for this is that this work focuses on the specifically *legal* strands of Hayek's thought. Thus, while Gray and Kukathas do examine Hayek's legal theorizing, this was not their primary interest, with Gray putting forward a comprehensive and insightful survey of the entire body of Hayek's work, and Kukathas focusing on Hayek's political thought. The present work, on the other hand, presents an extended examination of Hayek's specifically legal analysis.<sup>6</sup> But this is not, I think, the decisive reason for deciding to set aside Gray's and Kukathas' analyses and to take a fresh look at Hayek's theorizing. Instead, the most significant reason for restating Hayek's legal theorizing from first principles is the difference in approach taken by this thesis, as compared with the studies of these two authors. This work is interested in examining what previous studies have often simply taken for granted: the existence of order in conduct and society and the mechanisms which make such order a possibility. In particular, the focus of this work is on the relationship between

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<sup>5</sup> There are other surveys of Hayek's work which merit a mention, including Barry (1979) and Butler (1983).

<sup>6</sup> There are two excellent short surveys of Hayek's legal theorizing — Ogus (1989) and Thomson (1991) — though each has its own flaws, some of which are criticized, either explicitly or implicitly, within this thesis. Consider the latter: Thomson's view that Hayek has strong functionalist tendencies is indeed accurate, but his critique from a Habermasian perspective which implicitly assumes that a strong line can be drawn between issues of functionality and issues of meaning is itself open to objection. For what is probably the most comprehensive development of this point, see Millikan (1984; 1993), and for similar views, see Dennett (1987; 1995). For an objection to Ogus' criticisms, see chapters six and eight.

the properties of conduct governance mechanisms and the characteristics of the resultant order which they sustain, or are capable of sustaining. It is, then, the focus on the mechanisms of conduct regularity which leads to a substantive difference between this study and the perspective taken by Gray and Kukathas, and it is this difference which manifests itself most significantly in different conceptions of two of the pillars of Hayek's thought, the notions of spontaneous order and cultural evolution.

To put it crudely, Gray and Kukathas tend to focus upon spontaneous order as a genealogical concept, in that order which emerges "spontaneously" is treated as being equivalent to spontaneous order. On this view, it is the nature of the *origin* of the order which is decisive in determining whether or not it can be classified as spontaneous order. This way of viewing the concept of spontaneous order implies that one distinguishes spontaneous from non-spontaneous order on the basis of an examination of the *history* of an order. Now, while I agree with the idea that an examination of the history of how an order has emerged is of great importance, this thesis would argue that this is not the end of the story. Within this work, examinations of history are essential when one tries to determine what an order does, and is *capable* of doing, in different environments. Merely claiming that an order has emerged "spontaneously", without comparing the differences in capability between it and other types of order, does not shed light on what it does or what it allows one to do, nor on what it has the capability of doing, or of allowing one to do. Thus, resorting to a genealogical notion of spontaneous order, in isolation from an analysis of what this order is capable of doing or being used for in different environments, produces what is primarily a *retrospective* point of view.

There are numerous objections one could make to such a position, but as these are brought out in the main body of text, only a brief summary will be offered here. The principal objection to this approach is that these authors offer very little in the way of insights into the different *ways* in which order emerges, and the characteristic properties of the mechanisms which support each type of order. To them, the dividing line between spontaneous and non-spontaneous order seems to hinge around whether order emerges "spontaneously". But what, precisely, does "spontaneously" mean? More specifically, what characterizes order which is spontaneous and order which is not? That there is no answer to this in their work is not surprising, given their lack of insight into the relationship between the properties of the mechanisms which govern order and their relationship to the characteristics of the order which results. What might be more surprising is that, even

though one of them complains that making the distinction between spontaneous and non-spontaneous order is problematic,<sup>7</sup> these authors devote little, if any, time to investigating the differences between the two forms of order. In fact, their focus is almost exclusively on spontaneous order, with their discussion proceeding as if the differences between the two forms of order were obvious. Yet if there is one thing that the discussions of this distinction in the literature on Hayek have demonstrated, it is that these differences are not obvious, nor well understood.

These authors, then, devote little time to the difference between spontaneous and organizational order, and hence do not state the properties of conduct governance mechanisms which form the basis of such a distinction. In essence, then, their discussions take place in a mechanism vacuum, in which the term “spontaneous” has only a vague meaning. And this is not the only difficulty. Accompanying this, and in a sense based on their lack of insight into the distinction between spontaneous and non-spontaneous order, is a tendency to view too wide a range of evolved phenomena as being spontaneous orders. Hence Gray’s suggestion that it might be profitable to model totalitarian forms of government as spontaneous orders<sup>8</sup> — even though Hayek viewed totalitarian forms of government as prime examples of what he calls organizational order, i.e. non-spontaneous order. And hence Kukathas’ comment that Hayek has the “tendency to call anything grown and unplanned a spontaneous order” (Kukathas 1989, 202) — even though Hayek warns that the “spontaneous character” of an order must be distinguished from the spontaneous character of its origin (Hayek 1973, 46). It is, in the final analysis, this lack of understanding of the essential characteristics of the concept of spontaneous order, particularly when contrasted to non-spontaneous order, coupled with their lack of insight into the mechanisms which are essential to supporting each type of order, which renders their analyses suspect, perhaps even misleading, and ultimately of little value to the work at hand.

## 5. What are the questions?

It is, then, the lack of insight into the mechanisms which support social order and individual conduct regularity which differentiates this study from those of its predecessors. The present work aims to correct this oversight. It examines the mechanisms which support

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<sup>7</sup> See Kukathas’ comments (1989, 103-105).

<sup>8</sup> See the discussion in *Hayek on Liberty* (1986, 120-121).



conduct regularity and legal and social order, focusing on *how* such phenomena come into existence and are sustained. Moreover, it examines the properties and action-generating *potential* of conduct governance mechanisms and attempts to relate these to the characteristics of the type of order they are capable of sustaining, i.e. this analysis looks to the *future*, and not the past, to determine if a conduct governance mechanism having certain properties can generate an order of actions which could be classified as spontaneous.

This change in perspective leads to new paths of inquiry. What, then, are the questions which such a perspective seeks to address? This thesis argues that there are four intertwined strands of thought which might be addressed. By way of summary, these may be stated as:

- (a) How do individuals come to act regularly?
- (b) Why do individuals act regularly? Why not irregularly?
- (c) How are conflicts resolved, both within and between individuals?

(d) How is individual-level regularity and conflict-resolution related to conduct governance in its more institutionalized forms? And what are the implications of such a relationship?

These questions provide some of the common themes for the chapters which follow. The entire thesis is an investigation into the *mechanisms* which generate and support regularity at an *individual* level, and their reflection in and interaction with institutional forms of these same mechanisms. Thus, the focus of this thesis is not at the level of the institutional. Nor is it upon articulated knowledge nor deliberate reasoning *within* such an institutional framework. Rather, the emphasis is upon the generation and maintenance of conduct regularity at an individual level through the operation of various regularizing mechanisms.

Thus, the questions raised by this approach are different from those typically addressed by legal theory. This thesis is interested in the conduct governance properties of different mechanisms. Consider, for example, negative (prohibitive) and positive (performance prescribing) rules. Some questions which might be raised about this distinction would be: how do these differ in the way in which they govern conduct? How do changes in the degree of abstraction affect each type of rule? And how adaptive is each type of rule to changes in environmental complexity?

In this vein, one might also consider what have hitherto been considered to be principles of institutions insofar as they are manifested in individual-level conduct governance. For example, how is the principle of the Rule of Law manifested in the conduct of individuals?

Are there any important analogies between its operation at this level and at a more institutional one?

Each of these lines of investigation stresses the importance of considering *how* individual conduct becomes regularized. As this thesis will demonstrate, the consideration of this question leads one in four inter-related directions. First comes the idea that legal theory must shift its attention to issues of how individuals govern their own conduct. Subjecting conduct to the governance of rules occurs at both an individual and an institutional level, and there is much to be learned from the ways in which individuals strive to govern their own conduct which could be usefully applied to both the theory and the study of more institutionalized governance mechanisms.

Second, it implies that there must be more attention paid to what might be called the mechanisms of abstraction. These mechanisms are of fundamental importance to the maintenance of rules of conduct which are capable of supporting abstract social relations, and are intimately related to, what might be termed, the “legal quality” (i.e. the property of being legal).

Third, and flowing from this, is a need to place a stress on two essential properties of rules of conduct to which traditional legal studies have remained indifferent. The first property is that of abstractness. The argument of this thesis is that the degree of abstraction of a rule is of great importance to its governance properties, and to individuals’ ability to orient themselves in complex environments. Moreover, the issues surrounding governance by abstract rules are intimately related to issues of morality and value which are, of themselves, of no small importance. The second property of interest is negativity, which comes in two forms, the first being in the sense of prohibition. This thesis argues that negative prohibitive rules assume a greater importance as environments become increasingly complex, and that they have fundamentally different governance properties from positive, performance prescribing, rules of conduct. The second sense of negativity, which takes on a great importance, is negativity in the sense of negating. This thesis claims that the mechanisms of abstraction, and many of the conduct governance mechanisms of law, can profitably be viewed as (evolutionary) selection filters<sup>9</sup> which weed out unacceptable rules of conduct. This selection occurs over potential rules of conduct which

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<sup>9</sup> The notion of interpreting selection mechanisms as filters is common in evolutionary arguments, and has also been used by writers such as Robert Nozick (1974) when considering such arguments in a philosophical context.

embed “excessive” particularity. On this view, then, legal mechanisms are negative both because they filter out particularity (and its manifestations in positive rules of conduct) and because, in increasingly complex environments, the rules which are able to pass through these filters are both abstract and predominantly negative (in the sense of prohibitive).

Fourth, and finally, this thesis emphasizes the importance of embedding the above insights into an interactive, feedback, framework.<sup>10</sup> This thesis’ approach to legal theory is evolutionary and cybernetic, in that the processes of legal reasoning are represented as selection filters operating in interactive and mutually inter-dependent social systems. Moreover, when one turns, in the final chapter, to the foundations of conduct regularity, one finds an interactive, feedback-based, evolutionary approach indispensable.

## 6. The structure of the work

This thesis, then, addresses the question of how order comes to exist, both at the individual and societal level. In doing so it examines the mechanisms under which such order is generated and supported and the relationship between these mechanisms and different resultant forms of social relations.

The first chapter discusses two alternative forms of social order and their relationship to the properties of rules of conduct, while the second looks at the how social orders evolve and their relationship to rules of conduct which are followed at an individual level. The third, fourth and fifth chapters focus on mechanisms used to generate and support rules of conduct, with the emphasis being on those rules which are capable of supporting abstract social relations. The sixth chapter turns to an examination of the relationship between individual and societal conduct governance and its connection to law, while the seventh analyzes the principle of the Rule of Law, a crucial principle which provides a foundation for abstract social order. The eighth chapter points out some limitations on social action implied by an adherence to governance by abstract rules of conduct as manifested in the principle of the Rule of Law, while the ninth and final chapter introduces a model of mind which might explain how regularity comes to be embedded in human conduct at what is perhaps its most foundational level.

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<sup>10</sup> Sometimes also referred to as a cybernetic, or systems theory, framework.

There are a couple of final comments on the structure of this work which are perhaps worth mentioning. The first pertains to the ordering of the work. The first two chapters (of this work) examine what might be thought to be explicitly social issues, the first examining the nature of social order and the second focusing on the notion of cultural evolution. Why, then, does the thesis begin with a stress on social phenomena if the emphasis of the thesis is on individual-level issues of conduct governance? There are three reasons which come to mind. First is the obvious point that the views expressed in this thesis have evolved, with more of a stress placed upon individual-level analysis as the writing of the thesis progressed. Second comes the point that individual conduct governance does not occur in a vacuum but always takes place within a social context. Indeed, the values and culture which underlie conduct governance, both at an individual-level and from a more institutional level, exist as part of complex, interconnected feedback systems which in their interaction constitute the variety of societies in which individuals find themselves acting. It would be pointless to consider individual conduct governance without a social context, for conduct governance is about the adaptation of one's conduct to one's environment — and for all of us, the various societies which surround us *are* a major part, if not *the* major part, of our environment. Third, and finally, it is important to point out that the first two chapters, whilst focusing on social order and cultural evolution, do emphasize the individual-level aspects of each of these. Thus, the argument of the first chapter is that social order takes specific forms because of the nature of the rules which govern individual conduct, while the second chapter argues that cultural evolution may be interpreted as the evolution of systems of rules of conduct which are instantiated by individuals and by institutional forms.

A second comment is in order on the notion of cultural evolution which animates this work. There are, it seems, at least two ways that one can interpret a Hayekian approach to cultural evolution. First, one can view cultural evolution as being intrinsically linked to “spontaneous”, unplanned and radically decentralized conduct. This is the idea that cultural evolution proceeds primarily by trial-and-error at the individual level, with propagation occurring by individuals copying other individuals, adopting certain practices and abandoning others, and with selection being made in the sense that certain groups become “powerful” by being governed by certain cultural practices.<sup>11</sup> Now, this view of cultural

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<sup>11</sup> Hayek presents only the rough outlines of this process in *The Constitution of Liberty* (1960), *Law, Legislation and Liberty* (1973) and *The Fatal Conceit* (1988), but for a more detailed analysis, one might wish to consult Boyd and Richerson's *Culture and the Evolutionary Process* (1985).



evolution is indeed supported by Hayek's writings on the matter, and there is little doubt that he believed it to be an important form of cultural evolution.<sup>12</sup> Nor is its importance disputed in this work. Indeed, this form of cultural evolution lies at the very heart of the concept. But that being said, the important point to keep in mind is that if one views cultural evolution in this way, and *only* in this way, one can be led to make a rather fundamental error: that of ignoring *other* forms of cultural evolution. In particular, one might overlook the role of legal systems as evolved *selection* mechanisms. In other words, an over-emphasis on trial-and-error evolution at an individual level might blind one to the fact that legal mechanisms are themselves one *type* of cultural evolutionary selection mechanism which filters out mal-adapted rules of conduct. There is nothing intrinsic to the notion of cultural evolution which demands that it take place only at a decentralized level. Indeed, much of Hayek's work supports precisely the opposite point of view, and emphasizes instead the importance of institutional mechanisms for cultural evolution. On this view, one can argue that Hayek's investigations into cultural evolution extend to both decentralized phenomena, such as markets, language, and morality, and to more institutionalized forms, such as those of the legal and political spheres. Moreover, if one were to examine Hayek's work over the years, one could argue that Hayek's primary concern was in ensuring that individual evolution was well-supported by an evolved, and evolving, institutional framework which acts as a selection filter, weeding out unfit forms of conduct and integrating individuals' conduct within a social context.<sup>13</sup> From this point of view, the crucial issue to be addressed concerns which of the properties of a rule of conduct render it mal-adapted to its environment, the answer to which in turn depends upon the properties of the social ordering that is to be supported. This thesis argues that much of Hayek's legal analysis adopts such a point of view, and that his dominant interest resides in precisely these issues and their relationship to issues of conduct governance considered within such an evolutionary framework.

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<sup>12</sup> See, in particular, *The Constitution of Liberty* (1960) and *The Fatal Conceit* (1988) for more on this.

<sup>13</sup> As Hayek puts it, "the efforts of the judge are...part of [the] process of adaptation of society..." in which the judge "assists in the process of selection" (Hayek 1976, 119).

## 7. A terminological note

There is one final point to note before turning to the main body of the work. This is a word of warning to those readers who might be puzzled by the use of the term “mechanism” in this thesis. I use this term in its *abstract* sense (in the sense which is prevalent in the physical and cognitive sciences and in some of the social sciences), i.e. to refer to *how* something comes about or, equivalently, as a system of actions which produce results, and not in the more concrete sense of a machine or of a construct of deliberate human creation. In the sense that this term is used in the thesis, mechanisms exist even though no one could be said to have created them (i.e. they could have evolved in such a way that their existence is independent of any acts of human creation). On this view, then, markets are a type of mechanism, though once again I am referring to the abstract actions of the market mechanism, and not to their more concrete manifestations. The “invisible hand” of Adam Smith is another mechanism — one consisting of a complex network of cybernetic feedback — which is part of the more general market mechanism. Likewise, universalization is referred to as a filtering mechanism, part of the general processes of reasoning and abstraction. Each of these mechanisms are abstract, in that they refer not to concrete objects existing at a particular time and place, but rather to complex, inter-connected sets of actions which lead to results.

# Mechanism or Machiavellianism?

## Hayek on order and the evolution of culture

### 1. Introduction

This chapter will introduce a Hayekian perspective on order and cultural evolution by examining the recent treatment of Hayek's work in Alan Haworth's book, *Anti-Libertarianism: Markets, Philosophy and Myth* (1994). In his work Haworth dissects the arguments of some of the leading writers of libertarianism and argues that libertarianism is not much more than a statement of faith (or as the back jacket of the book fittingly puts it, a "market romance"). Hayek is included in this work because Haworth views him as a "guru for libertarians", i.e. "almost always hostile to state and government" (Haworth 1994, 120). Though Haworth recognizes that "Hayek thinks that government intervention is sometimes justified, his view is that in reality, it is *hardly ever* justified" (Haworth 1994, 120, italics in original). Thus, Hayek's inclusion comes about because of his alleged political and moral prescriptions.

*Anti-Libertarianism* presents a starkly political interpretation of Hayek. I want to argue against this. I will try to show that interpreting Hayek on political lines ignores certain points of fundamental importance, points which can only be appreciated if one shifts the focus from one of political issues to one concerned with the properties of conduct governance mechanisms.<sup>1</sup> It is because the political interpretation of Hayek's work is such a popular one,<sup>2</sup> and because Haworth's misconceptions are so widely held and frequently repeated, that his erroneous critiques become of interest. In examining two strands of Haworth's analysis — his examination of what he terms "the spontaneous order thesis", and his criticisms of the notion of cultural evolution — I hope to demonstrate that the

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<sup>1</sup> A point appreciated by John Gray (1986, 40, 134-135), although it must be said that Gray does tend to interpret Hayek in a political light as well.

<sup>2</sup> Some notable examples include Kukathas (1989), Gray (1986), Rowland (1987), Tomlinson (1990), and Thomson (1991).

spontaneous order thesis is based on Hayek's interest in informational mechanisms, as opposed to being predicated on a particular political ideology; that spontaneous order can be distinguished from organizational order; and that a notion of cultural evolution is a coherent one. In the conclusion I present some final thoughts as to why I believe Hayek's political and normative conclusions are not simply the expression of a political preference.

## 2. A summary of Hayek's theory of spontaneous order

At this initial stage, it might be helpful to produce a rough outline of Hayek's notion of spontaneous order, whilst at the same time highlighting certain definitional and epistemological prerequisites for an accurate understanding of the thesis. So what is the spontaneous order thesis? Consider Hayek's comments on the matter. The spontaneous order thesis is concerned with:

...the old insight, well known to economics, that our values and institutions are determined not simply by preceding causes but as part of a process of unconscious self-organisation of a structure or pattern...This insight was only the first of a growing family of theories that account for the formation of complex structures in terms of processes transcending our capacity to observe all the several circumstances operating in the determination of their particular manifestations. (Hayek 1988, 9)

As Hayek points out, there has been an enormous growth of research into "the evolutionary formation of such highly complex self-maintaining orders",<sup>3</sup> under various names "such as autopoiesis, cybernetics, homeostasis, spontaneous order, self-organisation, synergetics, systems theory, and so on..." (Hayek 1988, 9).<sup>4</sup> The spontaneous order thesis is thus concerned with *how* and *why* things are ordered. It focuses on the mechanisms behind that which appears as orderly.

Hayek's specific thesis is that there are two fundamental types of ordered systems: spontaneous and organizational. Basically, organizational orders are systems which have been designed with a high degree of conscious purpose, thus facilitating the exercise of a high degree of conscious control. Spontaneous orders, however, are systems which have not necessarily been designed, do not implement anyone's particular purpose and are not so

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<sup>3</sup> For examples of "self-maintaining orders", see Hayek's *Law, Legislation and Liberty*, Vol. I, *Rules and Order* (1973, 35-54) and *The Fatal Conceit* (1988, *passim*).

<sup>4</sup> One might also refer to Hayek's discussion in *Law, Legislation and Liberty*, Vol. III, *The Political Order of a Free People* (1979, 158-159).

readily controllable. An example of a spontaneous order would no doubt be useful.<sup>5</sup> Imagine you are at a dinner party, and people are interacting as people do at such events. If one observes carefully, one might discern numerous patterns of behaviour. One individual might conform to a pattern of talking very loudly. Another might continually stare at their shoes. Now, some of these regularities of action might be connected only to these particular individuals. Such idiosyncratic patterns are not of much interest for the spontaneous order thesis. There are, however, two types of regularities which *are* of interest. First are patterns which are more homogeneous across individuals. I will not look at these for the moment, but will return to these when I examine the *rules* of a spontaneous order. Second, there are patterns which are social (i.e. inter-personal). These patterns *between* individuals are one way in which social interactions might be thought to be orderly (ordered). These social regularities of action constitute an emergent<sup>6</sup> system which is generated by the individual interactions with, and mutual adjustment to, the actions of others. What is created, then, is a situation where numerous inter-personal (social) patterns (regularities) of conduct exist even though it was not necessarily the intention of any of the individuals involved that such social patterns should emerge.<sup>7</sup> Such an emergent system of patterns — of regularities — constitutes a spontaneous order (of actions).

Up to now I think the discussion has been relatively straightforward. However, for Hayek there is a crucial distinction between the *rules* that individuals are following and the overall *pattern of action* which is generated by rule-following. The implications of this difference are often not appreciated. What, then, constitutes a rule of a social order in the above discussion? The answer to this is ambiguous. It could be that *each* of the *social* regularities of action is a rule of a social order (of action). Or — and this is the usage Hayek employs<sup>8</sup> — it could refer to the common set of rules of conduct obeyed by all (or most) of the individuals. Hayek's usage, then, is as follows: an *order* refers to a *system* of social patterns of action (regularities of action), while a *rule of an order* refers to a *regularity of*

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<sup>5</sup> Hayek provides many of his own; see, for example, his discussions in *The Counter-Revolution of Science* (1979a, 141-152), *Studies in Philosophy, Politics and Economics* (1967, 66-81), *The Fatal Conceit* (1988, 11-28), and, in particular, *Law, Legislation and Liberty*, Vol. I, *Rules and Order* (1973, 35-54).

<sup>6</sup> For more on this notion, see for example P.M. Churchland (1988, 12-13).

<sup>7</sup> It is of decisive importance to Hayek's social theory that one recognize the possibility of emergent social phenomena. Indeed, "if social phenomena showed no order except in so far as they were consciously designed, there would be no room for a theoretical science of society and there would be, as is often maintained, only problems of psychology" (Hayek 1979a, 69) for "social theory begins with — and has an object only because of — the discovery that there existed orderly structures which are the product of the action of many [individuals] but are not the result of human design" (Hayek 1973, 37).

<sup>8</sup> As in Hayek (1973, 96-97).



*conduct* obeyed by most of the individual members of some such system.<sup>9</sup> Hopefully it is clear that these two things are not identical. A social order is a phenomenon produced by the combination of the actions of many individuals. A rule of an order is a rule of conduct which is obeyed by most of the members of a particular group.

So what makes a social order a spontaneous order? Is it that the resultant order is governed by rules which have been generated “spontaneously”? This cannot be true, for Hayek states that even where rules are dictated in advance the order which results could be a spontaneous order (Hayek 1973, 45-46). Instead, whether or not a social order is spontaneous depends on two inter-related criteria: the specificity/abstractness of the rules governing the order, and the connection of these rules to the intentions, goals and values of the individuals within that order. Once these criteria are understood, the relationship between spontaneous and organizational order, and between the rules of the two types of order, becomes relatively straightforward. Consider an example: a dinner party, similar to the above, but different in that all the individuals present were given general rules to obey before the interactions began (i.e. “be courteous to all you meet”, etc.). In this situation, the *rules* which the individuals obey are not of “spontaneous” origin, but the *patterns* which emerge from the various interactions and mutual adjustments could be constitutive of a spontaneous order.<sup>10</sup> The question may then be asked how this is related to an organizational order. In response it can be stated that if the *rules* which are handed out to the interacting individuals were to become more specific and refer to more and more specific actions, the *system* of actions which formed from following these rules *might* gradually

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<sup>9</sup> This is not to claim that such rule systems are *uniquely* related to particular orders of actions. As Hayek notes, “it is at least conceivable that the same overall order of actions may be produced by different sets of rules of individual conduct” (1967, 68). This being said, however, it should be noted that for particular orders of actions, the term “a rule of the order” refers to a regularity that is generally obeyed by most individuals of that system. The importance of this qualification will emerge later on in the work when attention is turned to legal forms of order.

<sup>10</sup> This illustrates one unfortunate aspect of Hayek social theory: his terminology. The use of the term “spontaneous” is particularly unfortunate. It seems that “spontaneous” can refer either to the spontaneity of the actions of the individuals involved or to that fact that a system has arisen or evolved spontaneously. Many commentators (Haworth included) have made the mistake of considering it to mean the latter, or of not defining what it is that differentiates a spontaneous from a non-spontaneous system. Given the ambiguous nature of the term “spontaneous”, this confusion is perhaps understandable. In the context of the terms “spontaneous” and “order” even Hayek seems to recognize that it has caused difficulties for his readers:

[i]t was largely the growth of cybernetics and the related subjects of information and system theory which persuaded me that expression[s] other than those which I habitually used may be more readily comprehensible to the contemporary reader. Though I still like and occasionally use the term ‘spontaneous order’, I agree that ‘self-generating order’ or ‘self-organizing structures’ are sometimes more precise and unambiguous and therefore frequently use them instead of the former term. Similarly, instead of ‘order’, in conformity with today’s predominant usage, I occasionally now use ‘system’. (Hayek 1979, xii)

result in a transition from a spontaneous order to an organizational order. This transition, if it is to occur, depends upon two factors: the degree of abstractness of the rules the individuals are obeying, and the connection of these rules to the goals and values underlying the order. To put it crudely, a rule of spontaneous order is abstract enough (in the sense elaborated below) if it allows individuals to obey the rule and at the same time achieve their own particular goals. A rule of organizational order is less abstract and restricts to a *greater degree* the ability of an individual to follow their own goals. Finally, it is worth noting that a command (a particular type of rule of an organizational order) is even more restrictive than a rule of organizational order, and produces a situation in which obedient individuals would merely be implementing the goals of the commander.

### 3. The abstract/concrete dichotomy

To flesh out the distinction between the two types of order it is probably necessary to give the reader a couple of warnings concerning terminology. Just as the term “spontaneous” in spontaneous order is apt to be misinterpreted, so is the term “abstract” as used in the discussion above. An “abstract” rule does not refer merely to the mode of expression of a rule. Expression is insufficient to define what is meant by abstract, for the most detailed particulars can be defined in abstract terms.<sup>11</sup> Instead, “abstract” refers to the scope of a rule. That is, “abstract” refers to the *spatio-temporal applicability* of a rule. This means that the more space and time which is governed by a rule, the more abstract the rule. “Abstract” in this sense refers to the rule’s *content*, and not to its form. “Abstract, general rules” refer to rules which are relatively less space-time specific than rules which are particularistic and concrete. That is, the conditions they describe could occur in a larger set of space-time locations. What distinguishes rules of spontaneous order from rules of organizational order is their generality of reference to time and space. The rules of organizational order are specific and particular precisely because they refer to more specific space-time locations than do rules of spontaneous order. An example might be useful. Consider three rules picking out particular things: a bottle of orange juice, a bottle of juice and a bottle. For the above definition of “abstract”, the rule picking out a bottle of orange juice is more space-time specific than the one referring to a bottle of juice, and the rule

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<sup>11</sup> As noted by Hayek (1976, 35).

picking out a bottle of juice is more space-time specific than the bottle rule. What this means is that the set “bottle of orange juice” occupies a smaller space-time location than does the set “bottle of juice”. Of course, all three are unlimited in the time and space to which they refer and hence all three could be called “abstract” rules. But *relatively* speaking, once the rule is applied in a particular environment (and its reference is fixed), these relationships of relative specificity will then hold.

There are two points which flow from this notion of abstraction which should be emphasized. The first is an epistemological one. The concrete/abstract dichotomy is of decisive importance because a spontaneous order may be much more complex than an organizational order. Organizations are “relatively simple or at least necessarily confined to such moderate degrees as the maker can still survey”; they are frequently “*concrete*” in the sense that “their existence can be intuitively perceived by inspection” of the external physical order; and finally, “having been made deliberately” or consciously “they invariably do (or at one time did) *serve a purpose* of the maker” (Hayek 1973, 38). A spontaneous order, by contrast, has “a degree of complexity” that is “not limited to what a[n individual] human mind can master”; “need not manifest itself to our senses but may be based on purely *abstract* relations between elements” both of which “we can only mentally reconstruct”; and “not having been made it *cannot* legitimately be said to *have a particular purpose*” (Hayek 1973, 38, italics in original). The complexity of a spontaneous order is the reason why it is necessary to resort to abstract rules which deal only with select aspects of an order. Spontaneous order is, in this sense, an epistemological characterization of an order.

The second point has to do with the notion of “purpose” and “function”. While one cannot assign a human purpose to a spontaneous order we can legitimately speak of the purposes of its elements<sup>12</sup> and, as well, attribute a *general* sense of purposiveness to the action of the elements in the sense that “their actions tend to secure the preservation or restoration of that order” (Hayek 1973, 39). In this context, Hayek’s notion of such a general purpose might equally be referred to as one of the *functions* of these actions. It is this move away from the particular purposes of individuals, and towards the general “purposes”, or functions, of social systems, that is apt to cause confusion. Now, given that Hayek’s use of

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<sup>12</sup> For example, it is difficult to speak of the *concrete* purposes of a language (though not of its general “purposes”, or functions), but it is not so difficult to talk of the concrete purposes of the individuals using that language. It is important to remember that Hayek is using “purpose” in the sense of very concrete ends and not in the more general sense with which one might be familiar.



the term “purpose” has caused numerous confusions in the past, and given that an understanding of this usage is in my view essential for a proper understanding of his notion of social order, it is perhaps worthy of some additional elaboration. Consider a conceptual point, integral to his theorizing, that Hayek continually stresses: that the rules of a spontaneous order are “independent of any *common* purpose” (Hayek 1973, 50). What precisely does this mean? In this context, “purposes” refers to the goals of individuals. But why, one might ask, does Hayek claim that there are no *common* purposes in this type of order? To answer this, one has to consider Hayek’s characterization of the two types of order.

To Hayek, organizational order is based on *rules* of organizational order and commands.<sup>13</sup> Commands determine “the function to be performed by each member”, “the purposes to be achieved, and certain general aspects of the methods to be employed” (Hayek 1973, 49). The rules of organizational order “depend on the place which [they have] been assigned and on the particular ends which have been indicated for [them] by the commanding authority” (Hayek 1973, 49). To be precise, we are talking of “rules which *at least to some degree* are specific to the functions assigned to particular persons” (Hayek 1973, 50, my italics). An organizational order is a “fixed structure” in which “the place of each individual...is determined by command” and their actions are governed by rules of organizational order. To summarize, then: in an organizational order we find (a) a structure, and in particular, desired ends, determined by specific individuals and (b) the rules that each individual obeys are conditional on the individual’s position in this structure.

The situation is quite different for spontaneous order. Rules of a spontaneous order are “independent of purpose”, or more accurately, “independent of any *common* purpose” (Hayek 1973, 50, my italics). Moreover, the rules of a spontaneous order are “the same, if not necessarily for all members, at least for whole classes of members not individually designated by name. They must be...rules applicable to an unknown and indeterminable number of persons and instances”<sup>14</sup> (Hayek 1973, 50). What this means is that in a

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<sup>13</sup> A command differs from an abstract rule in that (a) it necessarily presupposes a person who has issued it and (b) it is less general and abstract (Hayek 1960, 149).

<sup>14</sup> i.e. universal over a particular set.

spontaneous order rules (a) have no common ends and (b) are not conditional on the relative position of an individual within a fixed<sup>15</sup> structure.<sup>16</sup>

It is of some importance to keep in mind that Hayek's discussion rests upon a background distinction which is crucial to his argument, but which is rarely emphasized or discussed. This is his contrast between goals (ends) and values. For the moment, consider the former, and in particular, a contrast between two distinct types of goals (two types of ends): conditional and ultimate. What is it that makes "ultimate" goals ultimate? And what differentiates them from conditional goals? In a sense, conditional goals are manifestations, at a particular point in time, of ultimate, and more encompassing, goals. Goals are conditional because they condition on particulars — particular times, places, etc..<sup>17</sup> As conditional goals become more abstract, they transition into ultimate goals, which are less dependent on the conditions of the moment, and the particular, temporary, will of the individual. Note that if over a period of time one *continually* follows a conditional goal, this sequence of conditional goals might equally be viewed as an ultimate goal. That is, conditional goals transition into ultimate goals in that a conditional goal that extends over time and is repeatedly striven for can become, in effect, less conditional and can be transformed into (revealed as) an ultimate goal. In this light, conditional goals might be considered to be the consciously chosen over manifestations of ultimate goals. As such, conditional goals have a relatively brief temporal existence relative to ultimate goals.

Now consider the difference between goals and values. What is it that constitutes this difference? First, and to a matter of degree, goals seem to be the subject of choice and of consciousness, i.e. one *can* consciously choose between them.<sup>18</sup> One can do this, however, only because one accepts certain values unquestioningly. Goals are dependent upon certain values in the sense that goals presuppose the existence of these values. Such values form the foundation for goals, often existing as unquestioned "givens" which are simply presumed to

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<sup>15</sup> Fixed in the sense that the position of any individual is *determined* by the authority of particular individuals; that is, the rules which govern the actions of that individual are, in important aspects, determined by an authority.

<sup>16</sup> In the sense of "fixed" by the ends of another.

<sup>17</sup> Within a Hayekian framework, they are the "particular expected effects which motivate particular actions" (Hayek 1976, 14).

<sup>18</sup> That is, a goal is "most of the time" the focus of "conscious attention" and will "normally be the result of the particular circumstances in which [one] finds [oneself] at any moment" (Hayek 1978, 87).

exist.<sup>19</sup> In other words, goals exist *within* a framework established and sustained by the continuing existence of values.

Second, and related to this, values are differentiated from goals by being temporally more enduring. This difference in the degree of abstraction from the particulars of space and time is of crucial importance, for in the same way that conditional goals transition into ultimate goals as they persist over time, so do goals shade into values as they become more enduring and more continual in exerting their effects — i.e. as they become more long-term, as they transition from “executable” to “a standing obligation” (Hayek 1973, 127), and as they are less and less the objects of conscious choice.

Within a Hayekian framework there are, then, a variety of differences between goals and values, most of which overlap to a certain extent and which tend to differ by a matter of degree. These differences are, however, based upon a single distinguishing property: values are, within this framework, more *abstract* than goals.<sup>20</sup> This manifests itself in a variety of ways. First, the element of conscious choice is more applicable to goals than it is to values. This can be taken to mean that values are often present without the choice, or even conscious knowledge, of the individual.<sup>21</sup> It is probably of more importance, however, to interpret this as meaning that, relatively speaking, purposive activity, in the sense of “acting for a purpose”, presupposes the possibility of striving for alternative goals over which one consciously chooses. Under the framework elaborated above, such goals rest upon an abstract foundation of enduring values which act as the pre-conditions for such choice. In

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<sup>19</sup> On this view, it is important to keep in mind that the fact that one *has* certain values does not imply that this came about as a matter of choice, nor does it imply that one is conscious of, or can articulate, what these values are. The fact that one has values does not imply that one consciously knows what they are.

<sup>20</sup> In this light, consider Hayek’s discussion of these two terms. Goals, he stipulates, are the “particular expected effects which motivate particular actions” (Hayek 1976, 14), and are, under these stipulative definitions, associated with “will” (or “willing”), which is “the aiming at a particular concrete result which, together with the known particular circumstances of the moment, will suffice to determine a particular action” (Hayek 1976, 13). To Hayek, willing is necessarily associated with concreteness, in that willing “*always* refers to particular actions serving particular ends” (Hayek 1978, 85, my italics). Moreover, under this notion of willing “the will ceases when the action is taken and the end (terminus) reached,” i.e. to Hayek “an act of will is always determined by a particular concrete *end* (terminus) and the state of willing ceases when the end is achieved” (Hayek 1978, 86).

Contrast this with his discussion of values. These are “*generalized aims*” (Hayek 1978, 86), “generic *classes* of events, defined by certain [abstract] attributes”, existing as “a *lasting* attitude of one or more persons to a *kind* of event” (Hayek 1976, 14, my italics). They are associated with abstract “opinions”, which Hayek stipulates as “lasting or permanent disposition(s) towards (or against) *kinds* of conduct”, which “have no [particular] purpose known to those who hold them” (Hayek 1978, 85), and which are in many cases held without “any known reasons for them except that they are the traditions of the society in which they have grown up” (Hayek 1978, 85).

<sup>21</sup> As Hayek puts it, values are “largely culturally transmitted and will guide the action even of persons who are not consciously aware of them” (Hayek 1978, 87).

this sense, values would not be the *object* of choice, but would instead be the abstract framework upon which the possibility of choice between goals depends. A second manifestation of the greater degree of abstraction of values is that goals, relative to values, are relatively short-term, and are in many cases achievable and hence terminate when and if they are achieved. Values, on the other hand, are continual, long-term, and ongoing.<sup>22</sup>

The importance of all of this emerges when one realizes that Hayek's argument centres around the claim that there is an intimate relationship between the governance properties of rules of conduct and whether these rules serve (concrete) goals or (abstract) values. In effect, the claim is that rules serving particular goals are more concrete (in terms of the space-time specificity of their reference) than rules serving values. Why would this be the case? The general idea is that rules of organizational order work *within* certain environments presupposed by these rules. This restriction on the environments to which these rules are applicable, in addition to the restrictions which flow from the association of these rules with the (concrete) goals of specific individuals, renders them less abstract than rules of spontaneous order. In other words, it is because rules of organizational order presuppose the existence of a delimited sphere, within which certain (concrete) goals are striven for, that they are less applicable *across* different environments and hence more concrete than rules of spontaneous order.

Why, then, do rules of spontaneous order lack "common *purposes*"? They do so because Hayek defines "ends" and "purposes" as being relatively concrete and person-specific (Hayek 1976, 12-14), and because rules of spontaneous order serve abstract values, and not concrete purposes.<sup>23</sup> Organizational order is such that the rules of the order are, to some degree, aim at the achievement of particular individuals' specific goals. A spontaneous order is one in which the rules of the order, though they may be used as tools by individuals for the achievement of their own particular goals, do not aim at the achievement of particular goals. One important implication of this is that the rules of spontaneous order will be less space-time specific than rules of organizational order. That is, under the stipulative framework Hayek sets up, it can be said that to a matter of degree, the rules of

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<sup>22</sup> These (matter-of-degree) differences are for convenience summarized below:

**Goals — are concrete, i.e. they are**

- (a) the objects of choice
- (b) short-lasting
- (c) achievable, terminable

**Values — are abstract, i.e. they are**

- the pre-conditions for choice;
- enduring;
- ongoing, perpetual, not terminable.

<sup>23</sup> As Hayek puts it, the rules of spontaneous order "serve not (concrete or particular) ends but (abstract and generic) values" (Hayek 1976, 14).



organizational order are more context-specific (as they, to some degree, presuppose particular environments and embed particular individuals' concrete goals<sup>24</sup>) and hence are also more space-time specific. Another implication is that in obeying the rules of an organizational order, one's actions will be to some degree contingent upon the goals of the organization. In other words, the rules of organizational order manifest (to some degree) the context-specific goals of the organization. The rules of a spontaneous order, on the other hand, allow the individuals who are obeying them to pursue their own goals to a much greater degree.<sup>25</sup>

#### 4. The importance of the abstract/concrete distinction

The discussion above has attempted to spell out the differences between spontaneous and organizational order. But what, then, is the importance of such a distinction? To Hayek, all social order is a mixture of the two types of order. But — and this is the decisive point — one cannot mix the two types of order in any proportion which is desired.<sup>26</sup> They are, in a sense, mutually exclusive. The argument presented here is that Hayek emphasizes the difference between the two types of order by emphasizing the abstract/concrete nature of the rules of an order. Why does he do this? The reason, it seems, is that Hayek is concerned with the *results* of following rules of different degrees of abstraction. Hayek's argument, briefly put, is that the order which results from following rules of organizational order is less diverse, less complex, less amenable to the possibility of objective judgment, and less likely to be able to fulfil the goals of the largest number of individuals. In Kantian terms, then, the ideal Hayekian society would be one in which everyone followed *their own* goals and values (i.e. one in which an individual pursued their own ends, observed their own values, while being governed by the same rules as everyone else). To put Hayek's fundamental concern another way (and very crudely): the important point is the number of people following their own goals and values in society. The fewer people following their own goals and values there are, the more a social order approaches an organizational order.

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<sup>24</sup> Though as Hayek admits, "in most complex types of organizations...little more than the assignment of particular function and the general aim will be determined by command of the supreme authority" (Hayek 1976, 50).

<sup>25</sup> One implication of all of this is that rules of spontaneous orders can be considered the *means* to different ends (i.e. the ends of those *using*, or following, the rules) whereas rules of organizational order will necessarily *embed* particular ends.

<sup>26</sup> As in Hayek (1973, 46).

The more people following their own goals and values there are, the more a social order tends towards a spontaneous order. Yet another way of looking at it would be to ask the following questions: (1) am I a means to someone else's ends and values? and (2) if so, am I achieving my own ends and respecting my own values at the *same* time?<sup>27</sup> In a spontaneous order, even if one is a means to someone else's ends, one has sufficient latitude to simultaneously achieve one's own goals and respect one's own values. In an organizational order, on the other hand, individuals other than the organizational goal-dictators achieve their own ends and values to a lesser degree; Hayek's main concern, then, is to maximize the chance that individuals with their own goals and values, which might not be known to anyone else, are able to achieve or respect them to the greatest possible extent.

The differences between the two types of order assume even more importance when one realizes that the above discussion is intimately related to Hayek's legal theory and in particular to the Hayekian notion of what it is that gives a governance mechanism its "legal quality". In an argument strikingly similar to Lon Fuller's, a Hayekian would argue that law is a mechanism concerned with regularizing conduct,<sup>28</sup> and that this function — and *not* positivist arguments relating to "authorization" — distinguishes legal mechanisms from other governance mechanisms. Moreover, a regularization perspective leads one to make two related arguments, which shall be pursued at greater length in the later chapters of this thesis. First comes the claim that one of the primary functions of legal mechanisms is to regularize conduct by filtering out particularity and concrete goals. Second comes the related argument that to regularize conduct, both the individuals obeying the law *and* the law-makers themselves must subject their conduct to the governance of rules.<sup>29</sup> Both of these arguments are based on the underlying idea that in a complex, *Gesellschaft*-type society, individuals must resort to governance by abstract rules if the regularity required by the other members of that society is to be generated and sustained. The rationale behind these two arguments is that legal mechanisms aim at regularizing conduct, and they strive for this by filtering out particularity, both in the goals that guide individual conduct, and in

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<sup>27</sup> This is, of course, similar to one of Kant's elaborations of the "categorical imperative", as presented in his *Foundations of the Metaphysics of Morals* (1959, 47) and *Critique of Practical Reason* (1949, 87), and discussed at some length in Paton's study, *The Categorical Imperative* (1948, 165-179).

<sup>28</sup> As emphasized in Hayek's later legal theorizing and, in particular, *Law, Legislation and Liberty*, Vol. I, *Rules and Order* (1973, 94-123 and specifically 112-115).

<sup>29</sup> In the law-maker's case, to the governance of the rules constituting Fuller's "inner morality of law".

the activities of those who partake in the enterprise of subjecting individual conduct to the governance of rules.

None of this should be taken to imply that Hayek is arguing that individuals are not, or should not be, guided by concrete goals, nor that concretes are unimportant or irrelevant to issues of conduct governance. Instead, the argument is that abstraction is an essential element of conduct governance in complex societies, and that this being the case implies certain restrictions on the incorporation of concretes into conduct governance mechanisms. Moreover, Hayek is at pains to stress the importance of concrete knowledge, and the central role it plays within society.<sup>30</sup> What Hayek *can* be seen as arguing is that in some cases individuals have what might be thought of as a privileged access to their own concrete goals,<sup>31</sup> but that this privileged access does not extend to the concrete goals of others. The implication of this for conduct governance is that individuals following their own goals are in a sense better positioned to integrate these goals into a framework of abstract rules based on values than would be the case in a scenario in which their conduct were guided by the goals of others. The claim is, then, that if individuals are forced to make reference to the concrete goals of others, this implies that in certain cases these individuals will have a greater difficulty in acting autonomously and in conformity with general rules based on general values.<sup>32</sup> This implication is of some importance, for it feeds into the argument that if the rules governing interactions in a complex society become more concrete and function so as to implement the concrete goals of specific groups, spontaneous order becomes transformed into organizational order, and in the process a *Gesellschaft*-type society would change into a less diverse and less complex societal form. It is precisely this transformation which Hayek opposes.<sup>33</sup> Small wonder, then, that the distinction between the concrete and the abstract is of such importance to Hayek, for this distinction provides the basis for his legal theory, for distinguishing between legal mechanisms and alternative forms of

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<sup>30</sup> See, for example, his economic arguments in *Individualism and Economic Order* (1948) concerning the central role played by such forms of knowledge.

<sup>31</sup> Note that this does *not* claim that individuals' access to their own goals is somehow "transparent", "unmediated", or infallible. Nor does it imply that there is no interpretation required for one to "figure out" what their own beliefs are. Rather, the point being made is that if individuals have a different, and in some cases, closer, connection to their own goals than to the goals of others (who in turn can have a different relation to their own goals), then this should be taken into account by any conduct governance mechanism which aims to regularize individuals' conduct in a social context.

<sup>32</sup> For if the values were general enough to allow individuals to pursue their own goals rather than the goals of others, individuals would not have to refer to others for their goals.

<sup>33</sup> This idea is repeated throughout his work. See, for example, *The Road to Serfdom* (1944), and his discussion in *Law, Legislation and Liberty*, Vol. II, *The Mirage of Social Justice* (1976, 133-152).

governance, and provides an insight into a method whereby the complexity of a *Gesellschaft*-type society might be sustained.

## 5. Haworth on spontaneous order

The justification for spending so much time elaborating Hayek's spontaneous order thesis is twofold. First, this thesis might be unfamiliar to the reader. And second, the purpose of this chapter is to examine and critique Haworth's analysis of Hayek's social theory, with the aim of relating this critique to the wider concerns of this thesis. As Haworth's analysis rests in large part on his objections to the spontaneous order thesis, it seems appropriate to spell out in some detail the implications of this idea. I have contended that the difference between the two orders manifests itself in a variety of ways, such as the abstractness of the rules governing each order, the presence or absence of conscious purposes from the order, and so on. Haworth attacks the adequacy of all of these criteria. He claims that they are not adequate to distinguish the two types of order, and that in specific cases the thesis lacks any substantial content at all. Now, it should be said that Haworth does find much to recommend this thesis in *general*, particularly as it applies to the evolution of morality (Haworth 1994, 118-119). However, this does not imply that Haworth's analysis is predominantly positive. Indeed, much of the chapter on Hayek focuses on the weaknesses of the spontaneous order thesis.

Haworth begins by focusing on explicitly political issues. He wants to understand the relationship between the spontaneous order thesis, libertarian ethics, and competing economic theories. In particular, one question to be considered is whether "the spontaneous order thesis logically entails the overtly libertarian moral prescriptions Hayek recommends" (Haworth 1994, 121). What are Haworth's arguments against the proposition that the spontaneous order thesis entails Hayek's "libertarian" prescriptions? First, he argues that in cases of interest, the spontaneous order thesis tells us nothing about how to act or about when to rely on spontaneous order and when to resort to organizational order (Haworth 1994, 122). Is this argument correct? Perhaps not, for consider the following: spontaneous order, as Haworth correctly points out, has no (intention-dependent) purpose, but it does (or can) perform numerous functions.<sup>34</sup> Hayek's point is that spontaneous order can, in certain

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<sup>34</sup> The use of the term "functions" should not be taken to imply that these functions, nor the order considered holistically, are *functional* or *dysfunctional*. That is, no judgment of the *value* of these functions should be read



environments, fulfil certain functions better than organizational order. The question is why. Hayek argues that in certain circumstances this is the case because of the dispersed, fragmented and perspectivist nature of knowledge.<sup>35</sup> Consider an example. Hayek claims that in many cases markets, a particular example of spontaneous order, are better at coordinating fragmented knowledge than are organizational orders. Haworth seems to be of the view that Hayek is claiming that this coordination advantage exists in *all* circumstances and situations. This leads to Haworth's criticism that Hayek does not give an indication of when to rely on spontaneous order and when to rely on organizational order and, in the particular case of interest, when to use the market mechanism and when to resort to alternatives. Is this correct? And does Hayek almost always recommend the use of the market mechanism? I think not. It is important to point out that he commends organizational structures in many cases. The critical issue, however, concerns the *coercive* use of governmental organization. Conscious organization is one thing when goals are agreed upon and individuals strive in harmony to achieve these ends. It is quite another thing if there is disagreement about the ends to be pursued, with the result being that some have to be forced to accept the choices of others. The important issue in this context is the compatibility of the governance mechanism to its environment or, put differently, between the match between the properties of a governance mechanism and its ability to implement desired goals or support certain values.

None of this implies that Hayek does not advocate the use of alternative mechanisms, including governmental forms, in some situations, including coercive ones. But the resort to a particular governance mechanism must take into account the limitations of the recommended mechanism in different environments. The same applies to recommendations for the use of market mechanisms. Hayek, and many other economists as well, *would* recommend the use of organizational order when there is what economists term a *market failure*. Some reasons why markets might be an inappropriate mechanism might include inadequate definitions of property rights (including non-excludable and indivisible goods, externalities, etc.) and the market mechanism's weakness in coordinating actions which, by necessity, must be rapid and of a high degree of precision. Haworth claims that "the number

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into this usage. A spontaneous order can act as a means to one's ends, and it is in this sense that it can perform numerous "functions".

<sup>35</sup> This is a dominant and enduring theme in Hayek's work, and is emphasized in his 1937 paper "Economics and Knowledge" (1948, 33-56), and in later works, particularly *The Constitution of Liberty* (1960, 22-38), *Law, Legislation and Liberty* (1973, 11-17; 1976, 1-30; 1979, 67-70), and *The Fatal Conceit* (1988, 6-105).

and magnitude of the problems which quite clearly do demand collective action and planned intervention is much greater than Hayek suggests. (AIDS, war and pollution are examples)" (Haworth 1994, 122). This would seem to imply that Hayek suggests that these are inappropriate areas for government action. Unfortunately, this is not the case. Hayek states quite clearly that in cases of "epidemics" (Hayek 1979, 44), "pollution" (Hayek 1979, 43), and "war" (Hayek 1960, 54), government action is desirable. Why is this so? As Hayek puts it, market mechanisms are effective in environments where "the producers of particular goods and services will be able to determine who will benefit from them and who will pay for their cost" (Hayek 1979, 43). If this condition does not hold, markets would be rather ineffective. Epidemics, pollution and national defence are examples of instances where "it is either technically impossible, or would be prohibitively costly, to confine certain services to particular persons, so that [therefore] these services can be provided only for all (or at least will be provided more cheaply and effectively if they are provided for all)" (Hayek 1979, 44). Furthermore, in times of war what is required is a mechanism that can deliver rapid and precisely coordinated centralized actions, and markets have difficulties achieving this. It would be a mistake, then, to claim that Hayek advocates market mechanisms as appropriate for all environments, just as it would be erroneous to claim that he is "almost always" hostile to government. Such an error seems to indicate that Haworth has mistaken Hayek for a "typical" libertarian, and has failed to discern that there is an argument based upon the properties of governance mechanisms underlying his seemingly political prescriptions. There is, however, another, more fundamental, source of Haworth's errors. One only begins to discern exactly what this is when one turns to Haworth's analysis of the difference between the rules governing spontaneous and organizational orders.

#### 6. Haworth on the distinction between abstract / general and particular / specific rules

Haworth analyzes Hayek's notion of rules and the difference between "general, abstract" rules and "specific and particular" ones. In criticizing Hayek's notions, Haworth makes what I consider to be a rather bizarre claim: that "there can be *no such thing* as a class of 'specific and particular' rules with which to contrast the abstract and general" (Haworth 1994, 124). What exactly is the argument here?

Hayek's argument is that an abstract rule is defined by "a classical juridical formula" under which a rule "must apply to an unknown number of future instances" (Haworth 1994, 123, quoting Hayek, 1976, 35). It is not enough, then, for a rule to be merely *expressed* in abstract terms (Hayek uses the example of a rule referring to fingerprints to make this point). Rather, it is the *scope* of the *reference* of the rule which is decisive. Haworth argues that the "unknown number of future instances" criterion is insufficient to distinguish abstract from particular rules. He claims that there cannot be a specific and particular set of rules because "even classes which only contain one member — in fact and so far as we know, that is — potentially contain more" (Haworth 1994, 124). Hence, even "very specific rules... 'apply to an unknown number of future instances' and match the juridical formula Hayek cites" (Haworth 1994, 124). And what does Haworth have to say of rules which specify a single member at a particular time and place? How do *they* potentially contain more members? Haworth argues that "if time is cyclical and history repeats itself infinitely right down to the last detail", there would be an "infinite number" of future members (Haworth 1994, 124).

What is one to make of this argument? As Haworth puts it, "[this] speculation may be fanciful, but that is neither here nor there. It is sufficient to demonstrate that Hayek's thesis is, in at least one way, empty. Since it has to be true of *all* rules that they are 'applicable to an unknown and indeterminate number of persons and instances', it follows that there can be *no such thing* as a class of 'specific and particular' rules with which to contrast to the abstract and general" (Haworth 1994, 124).

This argument is simply bad reasoning. What Haworth *can* claim is that *if* history is in fact cyclical, *then* it will be true that all rules *which are external to this cycle* are infinitely referential. If, however, the rules are themselves internal to each particular time cycle, it is not at all obvious that they refer to other time periods.<sup>36</sup> And all of this applies *solely* to life on *this* "possible world". If, on the other hand, it is not the case that history is cyclical, Haworth's claim of infinite referentiality is not demonstrated but merely asserted. The general point is this: just because in one "possible world" rules *might* be infinitely referential does *not* imply that in *our* particular world they are. Unless, of course,

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<sup>36</sup> Imagine that history *is* cyclical and that one is considering a fingerprint rule which uniquely picks out a single individual. Why should it be the case that a fingerprint rule *which exists now* should be the one which refers to a particular individual in the future? If *everything* repeats itself down to the smallest detail, does that not imply that the *rules* repeat as well (and hence that a rule at time  $t_0$  refers to a world at  $t_0$ , while a rule at  $t_1$  refers to a world at  $t_1$ , unless it were explicitly stated as otherwise in the rule).

demonstrations of the cyclicity of *our* history and refutations of the criticisms above are forthcoming.

A more general criticism of this argument is that it ignores the fact that “abstract” and “particular” are *relative* terms, and hence some rules might be abstract relative to other, more particularistic, ones, depending upon how much space-time each refers to. The idea behind Haworth’s argument seems to be that for something to be a rule, it *must* refer to multiple future cases, and hence there can be no such thing as a particularistic rule. It is as if the very notion of a “rule” requires it to be “abstract” and that this is the same thing as asserting that the rule governs more than one case. The question which must be asked, however, is whether this is at all relevant to issues of conduct governance. The answer, I think, is that the central issue for questions of conduct governance *is* the scope of the space-time reference of a rule, and hence Haworth’s conceptual issue is of little importance. Is it not of obvious importance for issues of conduct governance to take into consideration the *number* and *type* of such references and their *possibility* of occurrence in a given environment? Haworth’s argument in a sense separates the question of whether a rule is abstract or particular from the content of the rule and the environment to which the rule applies. But how, one might ask, could one determine whether a rule refers *at all* without a consideration of both of these aspects?

Although I have been critical of Haworth’s interpretation, I would agree with him that Hayek’s “classical juridical” criterion is a rather poor one, as it seems to obscure more than it clarifies. Consider an example. Imagine one was considering a rule governing behaviour solely over the next week. Is this an example of a rule which governs an “unknown number of future instances”, even though it is in effect for a known time? This would depend, it seems, on the content of the rule and the environment to which it was referring. Hayek’s characterization is, I think, an inadequate one for determining whether a rule is abstract or particular, for such a characterization requires a consideration of its content and the environment to which it is applied. Of course, one could claim that almost all rules which govern future interactions *might* be instantiated an unknown number of times, but when considering issues of conduct governance the decisive questions concerning the range of applicability of rules can only be decided by turning to an examination of their content in a given environment.

The question of primary importance at the moment is whether the damage inflicted by Hayek’s inadequate characterization of what it is that distinguishes abstract from

particularistic rules is fatal to the enterprise of constructing a Hayekian social theory. I would argue that it is not. As I shall argue in this chapter and later on in the thesis, Hayek's theory can be *made* coherent. My criticism notwithstanding, my interest in Hayek in this chapter, and in the thesis more generally, is not primarily destructive. Rather, I am more concerned with making the best of Hayek's argument by presenting an interpretation which, given Hayek's work *as a whole*, presents a Hayekian theory at its best. To this end, I have abandoned Hayek's inadequate definition for one which is compatible with the body of his work and which is more coherent with the foundations of his social theory. The abstractness of a rule, then, refers to the scope of its reference, and not necessarily to the mode of its expression and thus specific, particular, rules *can* be held in contradistinction to abstract, general rules as a matter of degree.

## 7. Haworth on the difference between spontaneous and organizational order

Haworth tries to make an argument that a distinction cannot be made between a spontaneous and a 'made' order. First, he claims that Hayek's argument is that an order which has spontaneously evolved is based on rules of a general and abstract character, whereas a 'made' order is based on commands (Haworth 1994, 124-125). Next, he points out that one difference between a rule which has spontaneously evolved<sup>37</sup> and a command is that only the latter is issued intentionally, with a purpose (Haworth 1994, 125). Finally, he tries to show that a spontaneously evolved rule can simultaneously be a command. Unfortunately, whether Haworth's demonstration is correct or not is quite beside the point, for he has made two mistakes which completely undermine his argument in terms of a critique of Hayek.

First, and most importantly, Hayek does *not* claim that the difference between spontaneous and organizational order rests on the difference between abstract, general rules and commands. He in fact says that it rests on the distinction between *rules* of spontaneous and organizational orders. Rules of organizational order are not identical with commands, for commands are, relatively, more specific and particular. Nor does Hayek claim that one can distinguish between spontaneous and organizational order using the difference between abstract, general rules and commands. Haworth himself brings out this fact when he quotes

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<sup>37</sup> This is Haworth's usage.



Hayek as saying “[r]ules of organization are necessarily subsidiary to commands, filling in the gaps left by the commands” (Haworth 1994, 125, from Hayek 1973, 49), and hence are *different* from commands. Thus, Haworth’s point is neither here nor there. It is irrelevant.

Second, Hayek does not equate a rule which has “spontaneously evolved” with a rule of spontaneous order.<sup>38</sup> As Hayek puts it, “while the rules on which a spontaneous order rests, may also be of spontaneous origin, this need not always be the case” (Hayek 1973, 45). In fact, “it is at least conceivable that the formation of a spontaneous order relies entirely on rules that were deliberately made” (Hayek 1973, 45). Thus, “[t]he spontaneous character of the resulting order must therefore be distinguished from the spontaneous origin of the rules on which it rests, and it is possible that an order which would still have to be described as spontaneous rests on rules which are entirely the result of deliberate design” (Hayek 1973, 46). Haworth has conflated the spontaneous nature of the rules governing an order with the spontaneous nature of the order. In Hayek’s conceptual framework, it is the order of actions which is, or is not, spontaneous. Moreover, it is the properties of the rules governing an order, and *not* merely their origin, which differentiates a spontaneous order from an organizational order. Once again, Haworth is arguing against a position which Hayek does not hold. And once again, Haworth’s point is irrelevant to Hayek’s spontaneous order thesis.

## 8. Haworth on cultural evolution

We will now turn away for the moment from the focus on spontaneous order and examine instead Haworth’s critiques of the notion of cultural evolution. I will postpone a discussion of the specifics of Hayek’s theory until the next chapter, and will instead focus upon Haworth’s more general objections to the idea of cultural evolution. These consist of

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<sup>38</sup> Though many discussions of Hayek seem to assume this is in fact the case. See, for example, Kukathas’ discussion, where he seems to be assuming that the distinction between spontaneous and organizational order as applied to social institutions lies in whether or not the institution can be considered a “spontaneous development” (1989, 103-105); or MacCormick’s critique of Hayek’s notion of social justice (1989), where similar thoughts are expressed. Gray’s discussion of spontaneous order (Gray 1986) leads me to believe that he makes a similar error. Gray’s work is notable for its *lack* of any discussion of the differences between organizational and spontaneous order. Instead, he focuses almost exclusively on instances of “spontaneously” evolved order. Moreover, he argues that it might be useful to consider certain “spontaneously evolved” institutions as examples of *spontaneous* order even though this contradicts Hayek’s claim that they are instead instances of *organizational* order (Gray 1986, 120-121). That the rules governing spontaneous and organizational order might be different, and that this might constitute the decisive difference between the two forms of order, never enters the discussion. Instead, his comments seem to revolve around the idea that “spontaneously” evolved order is equivalent to spontaneous order, and that it is this genealogical difference which is sufficient to distinguish the two types of order.

two inter-related critiques of the theory of cultural evolution which are of some importance. First, he claims that “whereas there is good scientific evidence to support the theory of evolution in biology there is nothing corresponding to this in the case of Hayek’s theory” (Haworth 1994, 128). That is, “in the case of the former, experiments have tended to confirm the evolutionary *mechanism* — the selection and random mutation of DNA...actually operates” (Haworth 1994, 128). He argues that “there ought to be something analogous to this within Hayek’s evolutionistic social theory; that is, evidence that non-interference with the spontaneous order produces optimal results” and this evidence “ought to be independent of the historical record which simply describes which ‘orders’ have actually tended to predominate over time” (Haworth 1994, 128). Second, he posits that although “the evolution of morality has left us with some out-of-date attitudes...it ought to be obvious that we have absolutely no way of determining which of our attitudes are the outmoded ones” (Haworth 1994, 128).

The first of these objections is ambiguous. There are two possible meanings. Perhaps Haworth is merely claiming that experiments in biology have demonstrated that evolutionary mechanisms operate (but do not necessarily produce optimal results). If this is the case, it would be sufficient for Hayek to point to evidence that cultural selection mechanisms actually operate. The evidence for such mechanisms is not hard to find. It has been documented in some detail<sup>39</sup> in Boyd and Richerson’s *Culture and the Evolutionary Process* (1985).<sup>40</sup> One might also argue that Hayek’s investigations into the processes of law<sup>41</sup> represent a detailed and sustained examination of some of the specialized cultural selection processes which act over and filter out particular rules of conduct (and indeed, this is the argument put forward in the chapters which follow).

Haworth, however, seems to be arguing for more than this. He states that Hayek should present evidence that “non-interference with spontaneous order produces optimal results” (Haworth 1994, 128). There are a couple of difficulties with this. First, Haworth does not

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<sup>39</sup> There are also discussions in, *inter alia*, the works of Cavalli-Sforza and Feldman’s *Cultural Transmission and Evolution* (1981) and Moran’s *Human Adaptability* (1982).

<sup>40</sup> This work is particularly valuable in that it points out how cultural evolutionary mechanisms can “malfunction” in the sense that what one would think to be optimal does not necessarily fare well in the selection mechanism. This is a point which should be stressed. The fact that there are mechanisms for cultural evolution does not imply they produce results which we find desirable. Nor does the fact that a culture has passed through a selection filter imply that it is therefore optimal in the sense that we find it desirable. The selection filter itself may be “flawed” in that we do not find its results desirable or we cannot understand why certain types, which we do not value, prosper while others, which we do value, decline.

<sup>41</sup> Consider, for example, *The Constitution of Liberty* (1960) and *Law, Legislation, and Liberty* (1973; 1976; 1979).

spell out the meaning of the term “interference” in this statement — a meaning which is obviously central to his very objection. It would be difficult to claim that Hayek argues for allowing the spontaneous order of society to evolve in a completely decentralized manner and without the involvement, correction, and guidance of legal or political mechanisms. As I have pointed out in the introduction to this thesis, such a decentralized (and politicized) interpretation of Hayek’s notion of cultural evolution overlooks the role that legal and political institutions play as selection mechanisms, and under-emphasizes the role of rational examination, critique, and change in a Hayekian vision of society.

Notwithstanding this ambiguity in Haworth’s argument, there is yet another issue which is problematic. Haworth seems to be positing that experiments with Darwinian evolutionary mechanisms have demonstrated that “optimal” results emerge. But — and this is the interesting question — what does “optimal” mean in this context? That the organisms that pass through the evolutionary filter of a selection mechanism are “well-adapted”? And what does this mean? “Well-adapted” to their environment?<sup>42</sup> “Well-adapted” to performing actions which produce results which are “valuable” (under some set of criteria) within that environment? And isn’t this similar to claiming that evolutionary mechanisms generate means which are well adapted to certain ends and values? If this is the argument that Haworth is presenting, then providing evidence for it in the cultural sphere would be an exceptionally difficult point, for the ends which humans desire and the values they cherish seem to be much more numerous and diverse than those of other organisms. As well, it becomes extremely difficult to *separate* the various ends, values and means (they are interconnected and they overlap). Nevertheless, Hayek *does* make general arguments that some institutional mechanisms which have evolved are well-adapted (or, to be more precise, not mal-adapted) to certain environments which have *also* evolved.<sup>43</sup> Hayek’s argument focuses on the limitations imposed by a space-time existence, as manifested in the fragmentation of knowledge. Presupposing these limitations exist, he then goes on to argue that well-adapted methods for generating and sustaining a “complex” order are those

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<sup>42</sup> Note that survival is not a sufficient condition for “well-adaptedness”. If one assumed it were, one would create a tautological circle, i.e. organisms which pass through — i.e. survive — a Darwinian selection mechanism are optimal, optimal is defined as “well-adapted”, and “well-adapted” is defined as “surviving”. Hence, organisms which survive selection are optimal because they survive.

<sup>43</sup> Note that this is not to argue that *all* institutions which have evolved are well-adapted, or that certain institutions are well-adapted to *all* types of environments. In addition, it does not imply that biological and cultural forms of evolution might not be in conflict. For a general discussion of how cultural evolution can produce mal-adapted cultural results, see Boyd and Richerson (1986, 241-279); while for an analysis of the potential tension between biological and cultural evolution, see Boyd and Richerson (1986, 172-240).

institutional mechanisms which have evolved to coordinate individual behaviour under minimal common-knowledge conditions. Hence his advocacy of market mechanisms (interaction mediated through the emergent, abstract and social phenomena of number prices, an externalized metric of value — money — and governed by “abstract rules of just conduct”) and the principle of the Rule of Law (using Hayek’s notion of that ideal, as dealt with in later chapters). This also explains his opposition to forms of distributive justice which conflict with the principle of the Rule of Law, and to centralized governmental economic planning in general. Hayek does *not* advocate market mechanisms in all contexts, nor does he always oppose centralized planning and the ideals of distributive justice (if they do not conflict with the principle of the Rule of Law, for example). What he does stress is that the choice of the appropriate mechanism depends in large part on the informational environment under consideration and the goals which one desires to be achieved. His claim is that some mechanisms are better adapted to particular informational environments than are others and, in the final analysis, that in the environment of a “complex” society, the well-adapted mechanisms are those of markets and the principle of the Rule of Law.

What Hayek does not do is provide *experimental* evidence for this claim. Instead, he points to population changes which have accompanied what he considers to be the adoption, to a greater or lesser degree, of these cultural artefacts.<sup>44</sup> This leads to the question of what *should* constitute evidence of “optimality”. Evidence on the well-adaptedness of animal species *does* tend to use changes in population as evidence of evolutionary suitability (or unsuitability). For instance, the fact that certain species have become extinct is *prima facie* evidence that they were not adapted to their environments (with “environment” defined in a broad sense). In a sense, then, arguments that one species has experienced rapid population growth while others have experienced a rapid decline is a sign — but not conclusive evidence — of evolutionary fitness or unfitness. How conclusive it is depends, *inter alia*, on how the term “environment” is defined and on the evidential weight given to reproductive fitness as a measure of overall fitness. The question which Haworth raises, however, is concerned with how one can point to evidence of *cultural* evolutionary “optimality” without making reference to a historical record of that which has *actually* dominated. In this vein, Haworth argues that Hayek should provide experimental evidence of “the optimality of non-interference with spontaneous orders”.

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<sup>44</sup> See his statements in *The Fatal Conceit* (Hayek 1988, 120-134).



This brings me back to the argument made above, i.e. that it is questionable whether Hayek's notion of cultural evolution depends upon the dubious argument that culture should be left to evolve in a radically decentralized manner, to the exclusion of rational critique and modification, and independent of cultural institutions. If this argument is a poor one, and if Hayek's notion of cultural evolution is instead a much wider one, the question arises as to what sort of evidence *could* be used to argue for the well-adaptedness of certain practices or institutions. One type might emerge in the form of general arguments concerning the well- or mal-adaptedness of certain institutions and cultural artefacts to certain environments. As I have argued above, Hayek does make these type of arguments. Another form of evidence might focus on the ability of specific mechanisms to generate specific results in experimental situations. Now, while there is some documented empirical evidence of the relative adaptedness of various products of cultural evolution, most of it is not experimental.<sup>45</sup> Why that should be the case is not difficult to guess. A combination of ethical restrictions (in what ways should adaptiveness be *allowed* to be demonstrable? over what time period? which individuals should benefit?), the difficulty of experimental design (what would constitute an "optimal" linguistic development, for example?), and numerous other difficulties lead to experiments in this area being relatively rare.<sup>46</sup> Given that there is not much experimental evidence in use in the social sciences,<sup>47</sup> it does seem a bit unreasonable to demand that Hayek produce evidence of that type.

In closing out this section, let us turn briefly to a consideration of Haworth's second objection to the notion of cultural evolution, this being that there are no known mechanisms for determining which of our moral attitudes are outmoded. On examination, this turns out to be a variation of one of his earlier arguments, i.e. that there is no evidence that cultural evolution selection mechanisms generate "optimal" results and hence, even if our morality has evolved, there is no way for us to know which of our moral attitudes are well- or mal-adapted. On the face of it, this is a poor argument, for many of the same reasons as are discussed above. Perhaps the most important of these is that it ignores the role of discussion, rational examination, and immanent criticism, taking certain values as a given. I have no doubts that such an examination is fraught with difficulties and value-laden. But, given our

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<sup>45</sup> See Boyd and Richerson (1986).

<sup>46</sup> There is, however, some experimental evidence on the informational and allocative properties of markets presented in *The Handbook of Experimental Economics*, (1995).

<sup>47</sup> Depending, of course, on how one classifies psychology.



evolved systems of values and beliefs about what we consider to be important, we *can* argue that *certain* cultural, or moral, artefacts are mal-adapted to the system as a whole or to the type of society we desire to promote.<sup>48</sup> This is not the end of the matter, however. Once such a mal-adapted artefact has been identified and it has been decided that change is desired, it must then be decided *how* the change will be brought about. This is in fact a question of utmost importance, for the methods of bringing about change must also accord with our system of values and with certain regularities we take as given. Thus, the question is not merely one of identifying what is mal-adapted or not, but also one of identifying the best mechanism for changing this mal-adapted cultural artefact. Although it can be argued that it is possible through immanent criticism to identify some cultural practices which do not accord with our general values, it should not be thought that this identification is the end of the story. Nor should it be assumed that the artefact and its effects can be modified in an equally effective manner by *any* mechanism of one's choosing. Different mechanisms produce different effects in different environments. Thus, it should be recognized that an examination of the roles played by cultural artefacts in an ongoing social order, and an analysis of their compatibility with that same order, are by themselves insufficient to address the question of what is to be done and *how* it is to be implemented and supported. For this issue to be addressed, there must be consideration given to the different mechanisms which can be resorted to and their ability to produce the desired results in the environments under examination. That this raises difficult issues is unquestionable, but this is not to say that they cannot be made, nor that there is no criterion to which one can resort in trying to resolve these issues.

## 9. Conclusion

Having examined Haworth's objections to the notion of cultural evolution, we have seen that these lead to issues of fundamental importance to Hayek's social theory. Similarly, and as pointed out previously, substantive issues are at stake when considering Haworth's arguments concerning the impossibility of distinguishing spontaneous from organizational order. It can be claimed, without exaggeration, that without the framework of ideas that underlie this distinction, Hayek's political and legal theory becomes incoherent. As argued

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<sup>48</sup> Using what Hayek would term "immanent criticism" (1976, 24-27).

above, this dichotomy rests in large part on the difference between abstract, general rules and specific, particular ones. And how important is this distinction? I will argue in later chapters that it provides the basis for much of Hayek's legal theory, and is intimately related to the nature of the power / authority structure of society. It is not surprising, therefore, that Hayek is so concerned to defend his spontaneous order thesis and his views on abstract and particular rules.

There is another fundamental point at play here. Much of Hayek's economic, political and legal theory is based on the idea that knowledge is fragmented.<sup>49</sup> An extremely interesting question is *why* this might be the case. The reason is both obvious and profound. Organisms exist *in* space and *over* time, and there are certain limitations imposed on organisms by temporal and spatial separation (i.e. we can't be everywhere at the same time; the fact that something exists in a certain space-time implies something else cannot; performance takes place at particular points in space and time; etc.). If one applies this insight to knowledge, one can see that access to some knowledge might be time-space specific, that is, it could not be known unless one were in some particular time-space relation to it, and, if one tried to know it, one would instead know something *different*.<sup>50</sup> The implications of this insight are many and varied and form the foundation upon which a Hayekian social theory is based. Indeed, it can be argued that the central problem that Hayek sets out to address is how individuals and societies adapt to the restrictions imposed by an existence *in* space and *through* time.

Many of Hayek's prescriptions can be better understood once one realizes that this is the question Hayek is addressing. For instance, consider Hayek's views on market mechanisms. Hayek argues that markets exhibit a high degree of spontaneous order. But Hayek is arguing more than this. He is not merely claiming that an economy *is* a spontaneous order but also that it *should* be (or that we should strive to make it so). And why should it be a spontaneous order? The argument is that a dependence on a high degree of spontaneous order is necessary *if* one wants to sustain the diverse and interconnected relationships which constitute a "complex" society *because* of the fragmentation and division of knowledge (and goals). This fragmentation arises because of the limitations inherent in a space-time existence. It is the desire for a "complex" civilization, widely-ranging in time and space,

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<sup>49</sup> As is pointed out in the analyses of both Gray (1986, 134-136) and Kukathas (1989, 10-12).

<sup>50</sup> For example, my knowledge of my emotions from my perspective is quite different from knowledge of my emotions from the perspective of another person related in a different spatio-temporal way to them.

and the belief that it can only be sustained by allowing individuals to use decentralized judgment, that leads Hayek to condemn measures of centralized control. In fact, if Hayek believed that a centralized institutional framework could generate the same results, he would not argue against them.<sup>51</sup> Hayek's entire argument is that these types of mechanisms cannot sustain the complexity with which we have become accustomed in a modern civilization. Hayek's social theory and its consequent recommendations are not simply the expression of a political preference. Instead, it would be more accurate to say that his political views are the expression of his social theory.

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<sup>51</sup> See, for example, his statement in *The Fatal Conceit* (Hayek 1988, 6-7).

# The Evolution of Order

## A Hayekian approach to cultural evolution

### 1. Introduction

Haworth's criticisms of cultural evolution which were addressed in the last chapter were directed for the most part against a general notion of cultural evolution, and not, to a great extent, to the particular version that Hayek puts forward. This chapter puts forward Hayek's views on cultural evolution and examines some of the criticisms that have been made of them. Hayek's ideas have been much discussed and criticized by his commentators. There is, however, much confusion in this critical literature. Hayek has occasionally been accused of advocating Social Darwinism. Others claim his definition of cultural evolution is tautological, generating the unacceptable conclusion that *whatever* evolves is well-adapted and beyond criticism. Still others believe his formulations are hopelessly vague and lacking any substantial content. While I have some sympathy for the last of these objections, they are all nevertheless erroneous, and none of them can be sustained given a careful and reasonable insight into Hayek's work. Social Darwinism may well be mistaken, but this does not impact on Hayek's theory, for he is not a Social Darwinist. However tautological some formulations of evolution might be, it is certainly an error to claim that Hayek's notion is tautological. And finally, whilst Hayek's work might be vague in part and lacking in "essential" details, there are important epistemological reasons for this, and they are consistent with the body of Hayek's work. This chapter, then, will try to elaborate the essential aspects of a Hayekian view of cultural evolution and, at the same time, point out those aspects which are *not* part of this theory.

Before turning to a summary of such a theory, I would like to stress the deliberately limited remit of the restatement presented in the pages that follow. This chapter will focus for the most part on the criticisms of commentators one might be inclined to say are intellectual compatriots of Hayek. The writers under examination are James Buchanan,

Chandran Kukathas and John Gray, three of the best-known writers in the literature of classical liberalism. The justification for restricting the study to these writers is that one might think that they would attempt to cast Hayek's work in its best possible light, given their shared predilection for the ideas of classical liberalism. In other words, one might expect these writers to have a better understanding of Hayek's writings, given the similarity of their underlying presuppositions and values. Unfortunately, this assumption would be incorrect. I will demonstrate that these three writers misunderstand and misinterpret Hayek's notion of cultural evolution. There is, it seems, no coherent understanding of Hayek's notion within the writings of these major contemporary exponents of classical liberalism. One of the reasons for this will emerge as the later chapters of this work unfold. However, I will be arguing, albeit indirectly, in this chapter, that Hayek's political views are a *by-product* of his more serious interest, the focus on conduct governance mechanisms and their connection to the nature of social order. The insights elaborated in this chapter, and much of the discussion of later chapters, aim to show that Hayek's political concerns are for the most part based on his investigations into the properties of the *mechanisms* of social order and, in particular, into the nature of the resultant social order which evolves by passing through a number of selection filters. If this view is correct — if Hayek's political preferences are for the most part a *reflection* of his insights into the properties of conduct governance mechanisms and the forms of social order these mechanisms are capable of sustaining — then it is perhaps not surprising that his classical liberal compatriots, who tend to emphasize the political aspects of his thoughts, come to misunderstand his work. Hayek, I would argue, is preoccupied with an investigation of the mechanisms which support an abstract society, and not so much with the particular constellation of values which happen to be associated with classical liberalism. In any case, it is the investigation of these mechanisms, and not the examination of any particular sets of values, which will constitute much of the chapter that follows.

This brings up a second and final point. It would perhaps be unfair to the commentators mentioned above to include Hayek's last work, *The Fatal Conceit* (1988), given that it would have been unavailable to them at the time of their comments. Accordingly, when examining the interpretation of each of these commentators, this chapter will focus on works available at the time of their comments.

The structure of the chapter is as follows. The first section focuses on the definition of Hayekian cultural evolution — both what it is, and what it is not. The second section



examines some criticisms of Hayek's notion of cultural evolution made by a number of Hayek's classical liberal commentators, with the validity of each criticism being assessed in the light of material available to each author at the time that they wrote. In considering these criticisms, the definition of Hayekian evolution is augmented and further fleshed out. Finally, the third and final section considers some general objections to a Hayekian theory and forms the conclusion of the chapter.

## 2. An overview

It is of the utmost importance to realize that Hayek's notion of cultural evolution works on *two* inter-connected levels, the individual and the social. Moreover, the Hayekian approach is characterized by its analysis of the interplay and inter-relationship between these two levels. The first level of analysis is a relatively decentralized one, focusing on issues of individual conduct governance and how it is that individuals, in their day to day conduct, are able to adapt to the various environments they encounter. Consider the following, somewhat over-simplified, summary of Hayek's views on this aspect of cultural evolution. Hayek claims that the products of decentralized human action over long periods of time are in many cases more adaptive than the products of a more centralized, and more rational, design. The idea is that that which is unplanned and not designed at a centralized level can be more adaptive than that which is rationally, and centrally, designed. In this vein, Hayek claims that "[h]umiliating to human pride as it may be, we must recognize that the advance and even the preservation of civilization are dependent upon a maximum opportunity for accidents to happen" (Hayek 1960, 29).<sup>1</sup>

These adaptations at a decentralized, individual, level are closely connected to a second level of analysis at a more inter-personal, social, or institutional level. One of Hayek's primary concerns is the way in which institutional level conduct governance mechanisms interact with mechanisms which are operating at a more individual level. It is this concern with the interaction between these two levels, and with the way that institutional level mechanisms mesh with individual level governance, that leads Hayek to recommend certain types of mechanisms as being better adapted to certain types of environments. For example,

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<sup>1</sup> I would qualify this statement by pointing out that what is desired is not merely a maximum of accidents, but rather such a maximum combined with a minimum of damaging consequences. The idea is that by grounding experimentation at a decentralized level, *social* harm can be minimized.

in the context of a complex society, to achieve the goal of maximizing “accidents”, while at the same time minimizing the degree of damage caused by these “accidents”,<sup>2</sup> Hayek advocates decentralized social, legal and governmental mechanisms. In economic systems, he prefers relatively decentralized market interaction to relatively centralized government direction. In law, he prefers change to be implemented via the relatively decentralized decisions of courts rather than through more centralized legislatures. And in government, he prefers less centralized systems to more centralized ones. Hayek’s goal would be to have systems of social regularities — rules — generated from as many decentralized sources and within as many different “societies” as is possible. His claim is that decentralized evolution often produces systems of rules which are better adapted to their environments than those which are generated by a more centralized rational examination and selection.<sup>3</sup> To Hayek, well-adapted systems of social rules are those regularities which have grown out of smaller “societies” and remain adaptive when put in the context of larger, more complex, societies. They are not, in many cases, the result of a deliberate and centralized design or choice.

None of this is to say that rational examination or design does not have a role to play in a Hayekian social theory. This is certainly not the case. Many writers on Hayek’s notion of cultural evolution seem to assume that it is by its very nature unplanned and radically decentralized to an individual level, as if this were somehow central to the very notion of evolution itself. This is, I think, a mistake, and particularly so when considering cultural evolution in the context of a study of legal mechanisms which act as evolved selection filters over mal-adapted rules of conduct. Both institutions and individuals have a role to play in cultural evolution, and it would be a mistake to emphasize the role of one at the expense of the other. This being said, the important point which is emphasized by a Hayekian analysis is the interaction and interplay between these two levels, and the restrictions the activities of one level implies for the activities of the other. Neither individuals nor institutions are unrestricted in their adaptive efforts, for they must both take into account not only the ongoing activities of others and the effects of their actions on the

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<sup>2</sup> This is an important qualification, and is only implicit in Hayek’s discussions of cultural evolution. It is nevertheless central to his notion of cultural evolution. Without making this assumption, one might be led to argue that Hayek’s goal would be to continually increase conflict and maximize the number and scale of accidents, regardless of their effects. This is not what Hayek has in mind; rather, the idea is one of a balancing between maximizing the opportunity for experimentation, while at the same time minimizing the harm which is caused by such experimentation.

<sup>3</sup> See, for example, his discussion in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978, 3-22) and *The Fatal Conceit* (1988, 6-105).

system of values that underlies their actions, but also the institutionalized constraints which exist around them.

From the point of view of Hayekian cultural evolution, the issue of primary importance centres around the match between mechanism and environment or, put differently, between what is desired or valued and the way in which it is achieved or sustained. It is of no small importance to keep in mind that certain mechanisms are only well-adapted to certain types of environments and are hence restricted in their range of adaptive applicability, i.e. they are well-adapted to certain environments, and mal-adapted to others. Legal mechanisms are in this respect no different from any other form of conduct governance mechanism, including market mechanisms and governmental forms — each is well adapted to performing certain types of activities in certain types of environments, and each is mal-adapted to performing other types of activities in other environments. The crucial issue, then, is the match between a governance mechanism and its environment, and this turns on what a mechanism is well-adapted, or mal-adapted, to delivering, given the (particular) goals and (abstract) values present in a particular environment.

All of this is related to Hayek's persistent emphasis on the process of abstraction as a fundamental component of conduct governance mechanisms in complex societies. Consider for the moment a radically decentralized form of cultural evolution. This type of social evolution has at least one potential difficulty: it can tend to produce *too much* diversity, too many individualized regularities, and hence increase the complexity of an already complex modern society. Thus, a radically decentralized social evolution can tend towards an ever increasing degree of informational and performative complexity, and orienting oneself can become increasingly difficult. How can this difficulty be overcome? Hayek's view is that one of the major roles of social conduct governance mechanisms is to reduce this type of complexity and at the same time allow individuals to successfully orient themselves in a complex society.<sup>4</sup> One way of doing this is by generating regularities, or rules, which when conformed to make society more predictable. However, if these rules are to reduce informational and performative complexity they must be relatively *abstract*.<sup>5</sup> To Hayek, the filtering out of context-specific knowledge and information through abstraction is a

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<sup>4</sup> This is one of the dominant themes in Hayek's later works, including *The Constitution of Liberty* (1960, 22-38), *Law, Legislation and Liberty* (1973, 8-34; 1976, 1-30) and *The Fatal Conceit* (1988).

<sup>5</sup> Closely connected to this is the property of negativity, which will be examined in some detail in later chapters.

fundamental method of reducing complexity. Hayek's advocacy of the principle of the Rule of Law and his praise of market-based mechanisms can be viewed from this perspective. So too can his objections to the notion of distributive justice. Hayek's primary concern is to emphasize the connection between abstraction, the properties of conduct governance mechanisms, and the form of society which results from the application of different types of governance. His emphasis, then, is based on the idea that the properties of governance mechanisms are intimately connected to their informational properties, and it is this element which is of decisive importance in assessing whether or not a social mechanism (or a goal which can only be implemented by certain types of mechanisms) is well-adapted to the framework of a particular societal type.

### **3. Hayekian cultural evolution is not identical to genetic evolution**

So much for a general overview of Hayek's notion of cultural evolution. What of its specifics? Hayek's theory has two components: negating and positing. The negating side has two main features. First, cultural evolution is not the same as Darwinian genetic evolution. Cultural evolution differs from Darwinian genetic evolution in "the manner in which the process of selection operates in the cultural transmission that leads to the formation of social institutions, and the manner in which it operates in the selection of innate biological characteristics and their transmission by physiological inheritance" (Hayek 1973, 23). In his view Social Darwinism errs in focusing on "the selection of individuals rather than on that of institutions and practices, and on the selection of innate rather than on culturally transmitted capacities of individuals" (Hayek 1973, 23). Given these statements, it would be difficult to claim that Hayek confuses genetic and social evolutionary processes.

### **4. There are no "laws" of evolution**

The second negative aspect of Hayek's theory is his denial of the possibility of formulating "laws" of evolution. Hayek believes that there is "no justification" for "laws of evolution", except perhaps "in a special sense of the word 'law'", it being as an "explanation of the principle" or the prediction of "the abstract pattern the process will follow" (Hayek 1973, 24). That "the theory of evolution consists of 'laws of evolution'" which are a "statement of a necessary sequence of particular stages or phases through which



the process of evolution must pass and which by extrapolation leads to predictions of the future course of evolution" is "certainly not true" (Hayek 1973, 23). The theory of evolution, he believes, "will depend on a very large number of particular facts, far too numerous for us to know in their entirety, and therefore does not lead to predictions about the future" (Hayek 1973, 23-24). Thus, Hayek's claim that there are no laws of evolution is equivalent to the claim that there are no *particularized/concrete* laws of evolution. He is not arguing, then, that there are no *abstract* principles which hold in general for evolving systems. "Predictions", in Hayek's sense of the word, refers to the foretelling of *particular* or specific events as opposed to more general "predictions of the principle" (Hayek 1967, 3-42). This distinction is in accord with elements of his epistemology.<sup>6</sup> When Hayek speaks of particular detail he is referring to the specificity and epistemological requirements of particular predictions. For a prediction of particular detail, what is required under Hayek's criterion is the *complete* set of particular facts which will determine *all* of the *relevant* details of the prediction. If these are not known — or knowable — then only prediction of the principle is possible.<sup>7</sup>

There is, however, one qualification which must be made to this argument. Hayek is presupposing a criterion of relevancy exists and that it is the same as *his* level of specification. He seems to be assuming that criteria of relevancy are shared between individuals, and that the degree of specificity of these criteria are the same (i.e. that these criteria are *objective*). This is not necessarily the case. Different individuals can hold different criteria of specificity depending on the goals and values which motivate their investigations. To put it simply: what is considered a "complete" set of particular facts and what is considered "relevant" depends on the goals and values of the individuals undertaking an investigation. There seem to be no grounds for assuming that they will be the same for all individuals. What this means is that the existence or non-existence of laws of evolution depends upon the informational criteria of the particular study in question, which will in turn depend upon the particular goals and values of the investigators. What

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<sup>6</sup> As expounded in *Studies in Philosophy, Politics and Economics*, chapters one and two (Hayek 1967); *New Studies in Philosophy, Politics, Economics and the History of Ideas*, chapters one to three (Hayek 1978); *The Sensory Order* (Hayek 1952), and as reformulated in the later chapters of the present work. It might be noted that Hayek's epistemic concerns have emerged in contemporary discussions of chaos theory, non-linear dynamics, and complexity theory. For a popular introduction to chaos theory and non-linear dynamics, see Gleick (1987), while for complexity theory, see Lewin (1993).

<sup>7</sup> What is relevant and what is irrelevant will be conditional upon the classification underlying the investigation. Thus, Hayek's claim would be misunderstood if one made abstract predictions and hence required only a relatively abstract set of relevant details to occur.



one investigator might call a particular law of evolution, another might describe as an “explanation of the principle”. If different individuals do not agree on the level of specificity of the investigation, and on what is relevant and what is irrelevant, there can be no resolution of this difficulty. The best that can be achieved is a clear statement of the level of abstraction that one is presupposing and the level of regularity that is sufficient within the assumptions of that theory to constitute a “law”. There is little point in debating whether or not “laws” of evolution exist if one is not clear on the implicit assumptions of the investigation which make this a meaningful claim. Once one has staked out a position concerning one’s desired level of abstraction, the required degree of regularity, and the particular aims of the study, there exists little more to say about whether or not a “law” of evolution is a “law”, for the meaning of such a definition would depend on the perspective underlying the study. Although there will be tests of the internal consistency and coherency of such a perspective, and although there may be degrees of overlap between different perspectives which allow comparative evaluations, one might posit that it is of little value to label different conceptions of “laws” of evolution as “right” and “wrong”, rather than merely *different*.

## 5. Restating the Hayekian notion of cultural evolution

The discussion thus far has focused on the negative side of Hayek’s notion of cultural evolution. What, then, constitutes the positive side of this theory? Hayekian cultural evolution has four important aspects. First, it focuses on systems of rules of conduct. Second, it is concerned, in part, with the evolution of mind. Third, it has its own definition of what it is for an order of actions, and a system of rules of conduct, to be “adaptive”. Fourth and finally, it is based on a notion of feedback and cybernetic interaction.

The first feature of Hayekian cultural evolution focuses on the evolution of *systems of rules of conduct*. Hayek continually emphasizes that cultural selection typically acts upon systems of rules and not upon particular rules considered in isolation.<sup>8</sup> In complex cultural systems, the effects of rules are not easily disentangled. The effect of one rule typically depends upon the other rules which are in effect at that time. As well, there is a variety of feedback effects operating in such systems. Given such interactions, it is frequently difficult

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<sup>8</sup> i.e., “systems of rules of conduct will develop as wholes...the selection process of evolution will operate on the order as a whole” (Hayek 1967, 71).



and often counter-productive to the enterprise of understanding the effects of a rule to separate it from its systemic implications. This might explain, then, why Hayek continually emphasizes the systemic quality of rules.

One implication flowing from the above is that Hayekian cultural evolution does not focus on the evolution of genes except insofar as they impact on systems of rules.<sup>9</sup> Nor is the focus upon the evolution of groups of individuals, except insofar as groups are defined by their members being governed by “common” rules (“shared rules”, if you will). In other words, except where the existence of groups is defined by the existence of a common set of rules, groups of individuals and systems of rules do not necessarily have the same referent.

The second feature of Hayekian cultural evolution is its emphasis on the *evolution of mind*. Hayek’s main interest is in how individuals orient themselves in different environments. Hayek’s argument is that in certain situations they do this through the governance of systems of rules of conduct. These rules of conduct embed themselves in the mind, and it is, essentially, the adaptation of mind to its environment which Hayek is interested in investigating.

It is important to keep in mind that this project also involves an examination of the relationship between the nature of different environments and the *properties* of different rule-systems which are well-adapted to orienting individual conduct. The Hayekian argument is that as environments become more complex, there must be a move towards rules which are relatively more abstract in their reference. That is, abstract rules are better adapted to environments of increasing complexity than are more concrete rules. Thus, Hayek’s concern is with conduct governance in different environments, and in particular in issues of conduct governance in abstract and complex societies. It is this focus which leads him to emphasize the fundamental importance of the process of abstraction and of the mind’s ability to form abstractions.<sup>10</sup> He stresses that if individuals are to be adequately guided in increasingly complex societies, they must come to depend to an increasing degree upon abstract rules of conduct.

There is another aspect of this investigation into abstraction which merits a brief mention. This is the analysis of the *standardization* of the rules which govern (and in part, constitute) mind. This analysis of standardization is intimately related to the *generation of*

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<sup>9</sup> See Hayek’s statement on this in *The Fatal Conceit*, p. 25.

<sup>10</sup> This shall be one of the topics of discussion in the final chapter (which discusses a Hayekian theory of mind).

*objectivity*, which is itself based upon the idea of a uniformity of rule-responses to different types of environments.<sup>11</sup> The Hayekian position is two-pronged. The first prong is the idea that abstraction sets in motion the potential generation of objective rules of judgment. This is an idea of great importance, and it shall be the subject of much investigation in the chapters which follow. The second prong is the relatively undeveloped insight that the standardization of rule-responses (of classification) can be put into effect by standardizing *that which is classified*. In other words, it is possible to arrange the environment in such a way that classifications of its aspects are made in an increasingly objective manner. This imposition of regularity onto the external environment, while extremely interesting, is however a relatively undeveloped aspect of Hayek's theory and will play a relatively minor, though important, role in the chapters which follow.

The third feature of Hayek's theory of cultural evolution is his notion of the *well-adaptedness* of a system of rules. In the context of cultural evolution, well-adaptedness refers to how well matched a system of rules is to its environment. This in turn depends on the nature of the environment in which individuals are trying to orient themselves. The Hayekian argument is that in complex environments concrete rules are inadequate guides to conduct, and hence are increasingly mal-adapted in increasingly complex environments. Abstract rules, on the other hand, are well-adapted to complexity (but can be poorly adapted to concrete situations), and hence tend to be increasingly resorted to as social interaction grows in complexity.

All of this is related to the fourth aspect of this theory, which is the idea of *feedback*. Feedback focuses on the adaptations individuals make to their conduct in order to achieve a better matching between their goals and values and the results of their conduct. Feedback effects are ubiquitous in cultural evolution and occur in situations of learning, where individuals are trying to adapt to certain types of situations. These adaptations can involve either a change in the goals and values themselves, or the adoption of different means to pursue one's fixed goals. Feedback, then, embeds the idea that adjustments are made to one's behaviour under a variety of error-correction mechanisms, many of them operating without the intervention of conscious direction. One important insight in this regard concerns the connection between feedback and abstraction. The Hayekian claim is that one of the general results flowing from continual error-correction at an individual level in

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<sup>11</sup> Both in the uniformity of externalized performance, and in the more internal aspect of rules, such as their meaning.

increasingly complex environments is the generation of increasingly abstract rules of conduct. The argument, then, is that in an increasingly complex environment it will be adaptive to resort to increasingly abstract rules for, otherwise, one will not be able to adapt to the increasing diversity of particulars which in part constitutes social complexity.<sup>12</sup>

Note that the above should not be taken as an argument for the abandonment of reason as a tool to be used to generate abstract rules of conduct or as a means of guiding one's own conduct. Far from it. Instead, it is a call for the recognition of both the existence and importance of other ongoing systems of rules, which exist in some cases as pre-conditions for reason, and for the acknowledgment that it is the interplay between reason and these ongoing systems of rules which is of decisive importance when analyzing the properties of conduct governance mechanisms in different environments. The Hayekian claim is that for a conduct governance mechanism to be adaptive in increasingly complex environments it must be capable of generating, or at least sustaining, increasingly abstract systems of rules of conduct. In addition, such mechanisms must to some degree mesh with systems of rules of conduct which are already in operation, and in particular with those rules, the existence of which, the conduct governance mechanism implicitly presupposes. Neither of these conditions *necessarily* conflict with the operation of reason as a means of guiding one's conduct, so long as reason conforms to the restrictions such conditions imply.

## 6. The well-adaptedness of social orders

Two of the aspects mentioned above require a bit more elaboration. The first concerns "well-adaptedness": what precisely does Hayek mean when he states "the natural selection of rules will operate on the basis of the greater or lesser efficiency of the resulting order of the group" (Hayek 1967, 67)? Or by his stating "the evolutionary selection of different rules of individual conduct operates through the viability of the order it produces" (Hayek 1967, 68)? Is Hayek not referring to the well-adaptedness of the resultant order of *actions* rather than to the adaptedness of the rules of conduct upon which such an order rests? Furthermore, what is his notion of "efficiency"? Of "viability"? And finally, what process of selection is ongoing over different actions?

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<sup>12</sup> For a detailed discussion of this argument, see chapter 6.

Consider, for the moment, a few more quotations which give a more specific picture of what Hayek is claiming. A “superior kind of order...” is one based on practices which help individuals to “more *effectively* pursue their ends” (Hayek 1978, 9-10). Such practices “are successful adaptations to the irremediable limitations of our knowledge, adaptations which have proved more effective methods for dealing with that incomplete, dispersed knowledge which is [human’s] unalterable lot” (Hayek 1978, 72). The function of these particular practices “was thus not to organize the individual efforts for particular agreed purposes, but to secure an overall order of actions within which each should be able to benefit as much as possible from the efforts of others in pursuit of their own ends” (Hayek 1978, 136).

From the above quotations one can infer that Hayek is indeed claiming that it is an evolved *order of actions* which is well-adapted in some way. But which way is this? His argument seems to be that one order of actions is better adapted than another if “the chances for any individual taken at random to achieve his ends” are greater in the former than in the latter. This is the case “even if it cannot be predicted which particular aims will be favoured, and which not” (Hayek 1978, 184).<sup>13</sup> In other words, if, for a randomly chosen individual, the chance to perform a desired action is maximized, the order in which that individual is embedded is “well-adapted” in Hayek’s sense of the word. This is, then, what Hayek has in mind when referring to the “efficiency”, “viability” and “superiority” of different orders (Hayek 1978, 9-10 and 1967, 68).

An important objection which should be raised at this point is why Hayek insists on referring to an *individualistic* criteria. Why, one might ask, is he focusing on the achievement of an individual’s goals, and not on other social goals which one might think to be of equal, if not of greater, importance? This is an important question, for it brings to light an implicit assumption which underlies much of Hayek’s social and legal analysis. This is the assumption of the spatial and temporal range of the social systems he has under consideration. Hayek is implicitly presuming that the social systems he is examining are diffuse, spread out over space and enduring over time. As I argue at length in a later chapter, Hayek is comparing the governance properties of rules of conduct while at the same time presupposing that social interaction retains a complexity roughly equivalent to that of a complex, *Gesellschaft*-type society. To be more specific, he is asking the question of whether concrete rules of conduct are capable of dealing with the levels of complexity of a

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<sup>13</sup> See a similar idea in *Law, Legislation and Liberty* (1976, 132).



*Gesellschaft*-type society. If this is the question of interest, then there is a case to be made that the criteria for well-adaptedness of a social order *must* resort to an abstract individualist level for the reason that the degree of commonality, which is presupposed by more collective criteria, either does not exist or is in many cases not implementable in a relatively *objective* way in a complex society based on abstract social relations.<sup>14</sup>

But why, then, does Hayek refer to the well-adaptedness of an order of *actions* and not instead (as I have done) to the adaptedness of systems of *rules* which govern this order? Is there a significant difference between the two perspectives? The answer is, I think, that there is no significant difference between the two, for they are merely two sides of the same coin. To see this, imagine a biologist referring to, say, the well-adaptedness of an organism. Saying that an organism is well-adapted *always* presupposes some background environment to which the organism is adapted. The notion of adapted, then, always presupposes the broader notion of “adapted to some environment”. The same holds true for references to the well-adaptedness of rules of conduct. These rules are well-adapted to certain forms of environments, but perhaps not to others. For a statement of the well-adaptedness of a system of rules of conduct to be intelligible, there must always be a reference made to the environment within which the notion of “adapted” takes its meaning, be it explicit or merely implicit. Having said this, the important insight into the symmetry between Hayek’s statement and the one made in this thesis comes when one realizes that the environment to which rules of conduct are adapted is in large part constituted by the actions of *others*, and that Hayek is *presupposing* a level of complexity in the environment of individuals equal to that which would be found in an abstract, *Gesellschaft*-type society. In other words, *my* rules of conduct are well-adapted to *my* environment which consists of the conduct of *other* individuals following *their* rules of conduct. The same holds true for each and every individual and group in a society. In a complex society the order of actions which comes to exist is “viable” (in the sense of allowing individuals to pursue their own goals) *because*

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<sup>14</sup> To be more specific, Hayek is arguing that the governance mechanisms of a *Gesellschaft*-type society are in large part based on and adapted to an *abstract* individualist criteria. The reason for this, he argues, is that a *Gesellschaft*-type society is sustained by individuals governing *their own* conduct using mechanisms based on common abstractions which are in large part manifested as negative rules. That they are based on common abstractions flows from the claim that concrete commonality is lacking, while their being based on negative rules implies that these mechanisms can govern simply by ensuring that individuals *refrain* from certain types of conduct. These arguments are presented in some detail in chapters six and seven and, consequently, I will not rehearse them here.

individuals are following at least to some degree well-adapted abstract rules of conduct.<sup>15</sup> In other words, it is because others are acting regularly and basing their conduct on well-adapted abstract rules that produces a viable social order which gives me the chance to achieve my goals to the greatest possible degree.

The symmetry of perspectives concerning orders of actions and abstract rules of conduct flows from the fact that statements concerning the well-adaptedness of certain orders of action necessarily presupposes the existence of some set of rules of conduct which generate this order. This holds with special force for Hayek, who focuses on abstract and complex forms of society, and hence is arguing that individuals must be guided by abstract rules of conduct which must in turn be, at least to some degree, well-adapted to the abstract order of conduct which in part constitutes the abstract order of society (for otherwise the individuals would not be able to guide their own conduct and hence act in a regular enough way to sustain that society).<sup>16</sup> To argue, then, that an order of actions is “efficient”, more “viable”, or “superior”, is equivalent to arguing that the rules of conduct followed by the individuals in that society are well-adapted (to life in that society) — and in an abstract, *Gesellschaft*-type, society this implies, as will be discussed at greater length in a later chapter, that these rules are relatively *abstract*.

To stress this point, I might put it another way. For Hayek to argue that a social order is more “viable” is to argue that it allows for individuals to achieve their own goals to a higher degree than some other order. Hayek chooses this criterion because he is concerned with *maintaining* the level of complexity and spatial scope of an abstract society. That is, in the feedback loop flowing from the ongoing order of actions to the individual’s expectations and choice over their plans of action, and then back again, the general Hayekian aim is that there be the highest degree of conformity between what happens and what one expects to happen. It is this matching of expectations to actuality that gives individuals the chance of fulfilling their feasible plans of action. In a similar way, the claim that a system of rules of conduct is well-adapted means that such rules produce a minimum of conflicts in the order of actions which they engender and hence give individuals the maximum chance as individuals to pursue their own goals in their own ways.

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<sup>15</sup> It should be noted that the *possibility* of rational examination presupposes exactly the same pre-conditions, in that those advocating a resort to reason must be presupposing that at least the rules governing the operation of reason are well-adapted to their tasks.

<sup>16</sup> This is one of the main arguments which underlies chapter 6.

One of Hayek's reasons for emphasizing the "efficiency" of a social order rather than of rules of conduct was his desire to contrast the ability of different conduct governance mechanisms to support different societal types. Thus, much of Hayek's discussion of "efficiency" and "viability" refers to *between* society comparisons of governance mechanisms, taking the desired degree of complexity to be that of a *Gesellschaft*-type society. To put it another way, Hayek's baseline for evaluating a conduct governance mechanism is its ability to sustain a *Gesellschaft*-type society. Though such an evaluation is also of interest in this thesis, the goals pursued here are somewhat different. The main reason for placing a stress on the adaptedness of rules of conduct, and shifting the focus away from orders of action, is that this work focuses on the various selection filters acting over these rules *within* an ongoing society. For reasons of informational and performative complexity, these filters are almost inevitably focused on individual rules of conduct and not on the overall order of actions. Thus, under these mechanisms for filtering out unacceptable conduct, it is intelligible to say that one mode of conduct is mal-adapted, taking a certain order of actions as a "given". The issue, generally speaking, is not whether the *entire* order of actions is viable or conducive to individuals' achievement of their own goals, but rather whether a particular rule of conduct is compatible with an ongoing order of actions. Another advantage of focusing on the adaptedness of rules of conduct rather than on the "efficiency" or "viability" of a social order of actions is that one can then speculate on the effects associated with the introduction of hypothetical rules and examine their potential conflicts with an ongoing order of actions. This advantage, however, is a limited one, as I shall discuss in the section which follows.

## 7. Feedback and cultural evolution

The importance of the idea of feedback to Hayek's theory of cultural evolution cannot be underestimated. The reason for this is that feedback impacts on the *feasibility* of implementing systems of rules. Consider an example. Throughout his life Hayek made numerous objections to what might be called old-style socialism (i.e. socialism with the goal of nationalizing the means of production, distribution, and exchange).<sup>17</sup> Hayek's attacks for the most part aimed at establishing the *factual* impossibility of achieving the socialist vision

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<sup>17</sup> See Hayek's discussion of this concept in *The Constitution of Liberty* (1960, 253-254).

of society and at the same time preserving the *Gesellschaft*-type social relations of an abstract society. Hayek, in arguing against socialism, claimed that socialist plans were not merely contrary to the values of particular groups of society but, further, that they were impossible to achieve within the framework of an abstract society. Whether or not this is in fact the case for a socialist regime is not of interest at this point. I am more concerned with the implications of this *type* of argument for Hayek's notion of cultural evolution. Of special interest is *why* Hayek believed these plans to be infeasible.

This brings us back to the notion of feedback effects. It is the interplay between Hayek's notions of feedback and well-adaptedness which is of special interest here. Consider the implications of an argument for replacing a *system* of individual rules of conduct with another such system. It might be argued that within an existing system of rules conflict is not minimized and hence the rules are in some sense mal-adapted. Why not change these rules for another system of rules which is better adapted? Now, certain conduct, *if* performed by *everyone* in a *coordinated* manner, might very well reduce conflict more than an existing system of decentralized rules of conduct. The essential point, however, is in specifying precisely the alternative rules of conduct and the method by which they are to be implemented and sustained. Simply asserting the desirability of certain results is not enough, for it is conceivable that there might exist no system of rules which can both ensure such coordination will take place *and*, at the same time, preserve those *values* which underlie the argument for the replacement of the individual rules of conduct in the first place.<sup>18</sup> In other words, some of the values which people have come to depend on may very well depend upon the observance of the individual rules of conduct which, by assumption, no longer exist.

But why presuppose that we are *replacing* a system of rules with another? Perhaps it is the mechanism itself which is at fault. Why not replace the rule-based mechanism with another type of mechanism which can reduce conflict more effectively? The issue then centres on a choice between two mechanisms: one based on decentralized rules of conduct and another, as yet unspecified. Assume for the moment that conflicts exist within society which decentralized rules cannot eliminate. Another mechanism, if implemented (if implementable), might be able to reduce conflicts which a more decentralized rule-set cannot eliminate. So, why not choose the second route? This might seem like the obvious

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<sup>18</sup> For a similar argument, see Hayek (1976, 25-27).

thing to do, but appearances can be deceptive, for reasons analogous to those given above. First comes the problem of specifying the mechanism which will govern conduct. Next comes the question of implementation and sustainability. For the new mechanism to be the better-adapted, it must first be determined that (a) the conflict generated by the implementation of the new mechanism is not "too" substantial and (b) that the new mechanism is *capable* of supporting those ongoing values of society which led to its introduction.<sup>19</sup> If, for example, these values include those which are associated with *Gesellschaft*-type societies, it must be asked whether the new mechanism is capable of supporting these. It should be emphasized that the argument is not that a new mechanism might not be able to reduce forms of conflict which might not be within the scope of decentralized rules. This might very well be the case. What is being argued, however, is that it is the conflicts that emerge in the path towards being governed by a new method, combined with the ability of the new governance mechanism to support the ongoing values which are essential to its being brought into play in the first place (and which are presupposed by the very argument for a new governance mechanism), which are of the utmost importance and which must be subject to the same rigorous examination and articulation as is accorded to that which we hold to be desirable and worthy of pursuit. This implies that one must be careful to take into account any conflicts which may arise from the implementation of a new mechanism, both in terms of the transitional effects and in terms of the ability of the new mechanism to live up to the expectations and values which brought about the desire for change in the first place. In particular, it is the *mechanism of*

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<sup>19</sup> It might be questioned whether this addresses the scenario in which a new mechanism is introduced *because* the old mechanism and its attendant values are seen as outmoded. Surely in such a case, the elimination of certain values is one of the goals of introducing a new mechanism, and hence it would be spurious to argue that the new mechanism must be able to support the values associated with the old mechanism. This argument is a strong one. However, it might not undermine the one being made in this section, for the following reason. The fact that the old mechanism is considered to be outmoded says nothing of the ability of a new mechanism to support certain values. The view that one mechanism is inadequate in some respects does not imply the existence of another mechanism which is up to the task. And such a new mechanism must be able to support *some* of the values used to justify its introduction — otherwise, on what grounds can one argue that the new mechanism *should* be introduced? Moreover, values are often inter-connected with each other and with certain conduct which supports them. If there exists a connection between the values which are seen as outmoded, and those values which one desires to be preserved, one might find that one cannot simply eliminate certain values without undermining still others which one wishes to preserve. The fact that *some* values are seen as outmoded and associated with certain mechanisms does not imply that alternative mechanisms exist which are capable of supporting the complicated nexus of values and regularities which one does desire to support. Arguments which focus on the unacceptability of certain mechanisms to support certain sets of desired values often forget to inquire as to whether the new mechanisms which are advocated are capable of supporting these same values. In many cases, this capability is simply presupposed to exist — and yet it is precisely the argument of this section that what is required is a careful and detailed examination of the ability of the new mechanism to ensure that such values can, at least in principle, be preserved.



*implementation* and the time-scale which is under consideration which are key elements in deciding whether or not such a new governance mechanism would reduce conflict.

In the final analysis, the objections to both of these scenarios (i.e. with a new system of rules, or with new forms of governance mechanisms) are concerned with the adequate specification of the mechanism by which a set of rules of conduct is implemented, and the compatibility between the mechanism and the order of actions which is generated by these rules of conduct. The general aim is to ensure that the mechanism used to implement these rules of conduct, and used to resolve conflicts between these rules, is compatible with the order of actions which they generate. Hayekian objections are focused on mechanisms which do not generate *sustainable* orders of actions. Sustainable social orders are those which endure over time and which do not generate an order of actions capable of undermining the very values which support them.<sup>20</sup> This is an extremely complex issue, for such an undermining can take place over long periods of time. Values do not appear or disappear overnight, and the processes of cultural selection will be extremely complex. This being said, Hayek's claim is that *in the long run*<sup>21</sup> one will tend to observe the survival and propagation of systems of rules that are well-adapted in the sense of minimizing conflict within<sup>22</sup> ongoing social orders.<sup>23</sup> According to Hayek, systems of rules that do not have this

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<sup>20</sup> I would agree with Hayek (1976, 67) that it is definitely not the case that the striving for impossible dreams is a harmless activity. This follows from the fact that what is "impossible" and what is not often depends on human actions. Thus, it is the *attempt* to change the "impossible" to the "possible" which leads to many of the difficulties.

<sup>21</sup> Which is, of course, a rather nebulous concept.

<sup>22</sup> Though not necessarily *between* social orders. So long as relatively closed societies minimize conflicts *within* their own sphere, they continue to be sustainable. This means, then, that different rules *can* apply to outsiders. When, however, more abstract societies come into existence, they too must be based on the idea of minimizing conflict, and hence come to conflict with the idea of treating outsiders differently from insiders (for if an abstract society is extended to include the *whole* of humanity, *everyone* becomes an insider).

Hayek has been justifiably criticized for ignoring conflicts *between* social systems, and for overlooking the use of violence and other forms of coercion by members of one social system in subduing or eliminating those of another — see, for example, Gray's comments (1986, 138). This is a valid point and Hayek does downplay it. A social system can extend and propagate itself by a resort to violence. Of this there is no doubt, and it has been a persistent feature of human history. Can it be argued from this, then, that such violence is well-adapted behaviour? To answer this question (and, more generally, to argue for the well- or mal-adaptedness of a certain form of conduct), one must turn to a consideration of the goals and values which such behaviour promotes, and the environments in which such conduct might be considered to be well- or mal-adapted. Consider for the moment a *Gemeinschaft*-type social setting. Hayek would probably argue that the widespread perpetration of physical violence *within* such a social setting is incompatible with the foundations of social life, and that if the existence of social life is a value to individuals (and he argues that it is), then such conduct is mal-adapted to such environments. The question which must be considered, however, is whether widespread violence *between* *Gemeinschaft*-type societies — in effect, within a *Gesellschaft*-type society — can be considered in the same light. Once again, this would depend upon the goals and values which are to be supported and promoted under this form of conduct. I would argue that physical violence substantially undermines the foundations of an abstract, complex society and hence is mal-adapted within this form of society. That much of human history has been a story of violence and oppression does not imply that these societies were evolutionary "successes" under a

property will have a tendency to be selected out as unfit, implying that they will not propagate as “effectively” *in the long run*. That these are “selected” does not, of course, necessarily imply that they have been deliberately chosen by any individual or groups of individuals (nor, however, does it rule it out); rather, in this context “selection” refers to *between* society evolutionary selection, which ultimately is concerned with the propagation<sup>24</sup> or the contraction of the system of rules under examination,<sup>25</sup> regardless of whether this comes about by deliberate choice or by less intentional means.

## 8. Hayek's classical liberal critics: Buchanan and the tautological error

That concludes the restatement of a Hayekian theory of cultural evolution. I now turn to a critical examination of some of the objections which have been made to this theory by some of Hayek's classical liberal compatriots. Although one might be led to think that a similarity in political preference might lend some additional insight into Hayek's arguments for cultural evolution, this turns out not to be the case. It would seem that one's political preferences have little to do with one's ability to understand Hayek's arguments in this area. It is hoped that the discussion which follows goes some way to demonstrating this.

One criticism of Hayek is based upon a misunderstanding of his notion of spontaneous order and its relation to cultural evolution. Eminent Nobel Prize-winning economist James Buchanan, for example, argues that Hayek errs in “seeming to suggest that those institutions that have evolved spontaneously, through the independent responses of persons to the choices they faced, embody efficiency attributes” (Buchanan 1977, 32). In fact, he suggests that Hayek implicitly attributes “efficiency to whatever institutions emerge from an

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Hayekian theory of cultural evolution, nor does it imply that such methods are well-adapted to increases in complexity or to the abstract form of social relations which accompanies such increases. Though some societies may have fulfilled the minimal necessary evolutionary selection criteria of survival through the extensive use of aggressive violence, this does not imply that such forms of conduct are “well-adapted” for modern, complex societies, nor that they are well-adapted to life within more concrete societies. In my view, physical violence is a form of conduct which must be prohibited across different forms of social relations, for it fundamentally undermines social order if tolerated within, and destroys other cultures if tolerated without.

<sup>23</sup> In an abstract society, this minimization will coincide with maximization of the chances of individuals *within* this society to achieve their desired actions. It does not imply that *all* individuals in *all* societies will have this conditions fulfilled, though as one moves to a more encompassing notion of society which embraces wider and wider segments of various sub-societies, this will increasingly be the implication.

<sup>24</sup> Note that propagation or reproduction would seem to be a necessary condition for the evolutionary adaptedness of a social system. It is not, however, a *sufficient* one. In other words, the mere fact that a system has survived does not mean that it is well-adapted.

<sup>25</sup> This is of course resorting to Hayek's notions of “efficiency” and “viability” for such a *between* system comparison.

evolutionary process” (Buchanan 1977, 33). Referring specifically to market institutions, Buchanan repeats this claim: under Hayek’s theory of cultural evolution as “applied to the market economy, that which emerges is defined by its very emergence to be that which is efficient” (Gray 1986, 70). Buchanan believes that “this result implies, in its turn, a policy of non-intervention” (Gray 1986, 70). If “this logic is extended to the structure of institutions (including law) that have emerged in some historical evolutionary process, the implication seems clear that that set which we observe necessarily embodies institutional or structural ‘efficiency’. From this it follows, as before, that a policy of nonintervention in the process of emergence is dictated” (Gray 1986, 70). Thus, while admitting that Hayek “seems to allow for reform” to correct for evolutionary aberrations, he points out that Hayek offers no criterion for judgment of an institution’s fitness. Indeed, Buchanan’s opinion is that “to imply, as Hayek seems to do, that there neither exists nor should exist a guideline for evaluating existing institutions seems to me to be a counsel of despair” (Buchanan 1977, 34). This allowance for reform, coupled with both a lack of any criteria for judging whether an institution is fit or unfit and the claim that what emerges is, in any case, efficient, Buchanan finds to be “logically inconsistent” (Buchanan 1977, 37). Thus, in short form, Buchanan implies that Hayek subscribes to the view that spontaneously evolved institutions are, by definition, efficient and hence cannot be amenable to reform.

Now, are Buchanan’s arguments correct? Notwithstanding Hayek’s claims to the contrary, does Hayek commit a tautological error which, in effect, rules out reform? Furthermore, does Hayek equate that which evolves “spontaneously” with his concept of spontaneous order? Turn for the moment to the first of these questions. To address this, one must first examine Buchanan’s notion of “efficiency”. Assume that “efficient” has a well-defined meaning. Typically in evolutionary arguments it is taken to mean structures which are *well-adapted*. To make the best sense of Buchanan’s argument I will assume that this is what Buchanan means in this context.<sup>26</sup> Unfortunately, even this does not help Buchanan’s argument. He — but *not* Hayek — commits the error of regarding as informative the tautology of equating “that which has survived an evolutionary process” with “that which is

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<sup>26</sup> Otherwise, I am at a loss to deduce precisely what he means. Perhaps, however, he is referring to efficiency in the “technical Pareto sense” using his notion of contractarian agreement as its foundation. This is the idea that efficiency is “the institution’s ability to command assent in comparisons with effective alternatives that might be suggested” (Buchanan 1977, 34). That such a conscious, choice-based evaluation of efficiency is incompatible with the Hayekian notion of the *actual* matching between expectation and actuality (regardless of such a matching being consciously recognized), goes a long way to explaining why a contractarian notion of efficiency is not the one adopted in this section.

efficient". Survival does not ensure that an institution is efficient, nor can one state that all institutions which have survived until now are, from an evolutionary standpoint, efficient. Survival is one *result* of evolutionary efficiency — it is not identical with it.

#### 9. Response to Buchanan: Hayek on the notion of "efficiency"

Focus for a moment on the assertion that an efficient institution is one that is not amenable to reform. What one intends to assert is clear: an institution which is "best" (efficient) cannot be improved upon — for if it could it would not be "best" (efficient). The question, however, is how such an assertion meshes with Hayek's theory of cultural evolution. It should be clear that the *identification* of the aspects of an institution which are "best" is a very difficult problem which the above assertion assumes has already been solved. But according to Hayek it is precisely this identification which constitutes the crucial difficulty of claiming an institution is "best". Within a framework in which all the relevant attributes of an institution were known to all the minds involved in the evaluation, the term "best" or "efficient" would have a clear meaning. But such a scenario rules out the very real possibility of a difference in perspectives, in which different sets of attributes were thought to be relevant by different individuals, or in which some sets of attributes were thought to be more important than others — both of which might result in different notions of which institutions were "best". And all of this presupposes that the set of attributes which are relevant to such an exercise were known. Yet is it not arguable that social institutions are multi-functional and that it is often a matter of considerable difficulty to discover the multiplicity of functions such institutions serve?

All of this points to difficulties with the notion of "efficient" institutions. But, in fact, Hayek does not resort to such a notion. Rather, the Hayekian argument is that the difficulties in knowing which institutions are "best" or "efficient" does *not* rule out the possibility of recognizing particular aspects of institutions as being mal-adapted to their environments. One can know, for example, that a rule of conduct is mal-adapted without knowing a rule of conduct which would be well-adapted.<sup>27</sup> The possibility of reform, therefore, is intimately tied to the central themes of later chapters, these being the primacy of minimal conditions, negative rules, and the filtering out (the negating) of evolutionary mal-adaptations.

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<sup>27</sup> A theme which is recognized by Lon Fuller in *The Morality of Law* (1969, 10-13).



It might be added that Hayek does not make the related claim that an evolved institution is not in need of institutional reform, nor does he say that such an institution is not amenable to reform. In fact, he explicitly recognizes the need for, and ability to conduct, institutional reform of evolved institutions — a fact these commentators cannot explain. To give one example, consider his statement that “the fact that law evolved in this way [spontaneously] has certain desirable properties does not prove that it will always be good law or even that some of its rules may not be very bad. It therefore does not mean that we can altogether dispense with legislation” (Hayek 1973, 88). In other words, particular rules, or even “whole sections of the established system of case law” (Hayek 1973, 89) may be mal-adapted and have to be reformed using legislation. It is difficult to see how one can claim that Hayek denies the need for, or the possibility of, reform given this explicit statement on the issue.

#### 10. The conflation between spontaneous and evolved order

There is a related confusion concerning the relationship between Hayek’s concept of spontaneous order and the notion of evolution. As we have seen in the previous chapter, it is sometimes argued that a spontaneously evolved institution is necessarily a spontaneous order (for instance, in Kukathas<sup>28</sup> and to some degree in MacCormick<sup>29</sup>). Now, *if* an institution is a system of rules governing certain conduct and states of affairs, then this is incorrect. Hayek does not claim that a spontaneously evolved system of rules is equivalent to a spontaneous order, for he explicitly states that a spontaneous order may be an order of actions governed by rules which are not spontaneously evolved. As he puts it, “while the rules on which a spontaneous order rests, may also be of spontaneous origin, this need not always be the case” (Hayek 1973, 45). In fact, “it is at least conceivable that the formation of a spontaneous order relies entirely on rules that were deliberately made” (Hayek 1973, 45). Thus, “[t]he spontaneous character of the resulting order must therefore be distinguished from the spontaneous origin of the rules on which it rests, and it is possible that an order which would still have to be described as spontaneous rests on rules which are entirely the result of deliberate design” (Hayek 1973, 46). It is, therefore, the properties of the rules and the nature of the order of actions which results from their being conformed to

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<sup>28</sup> It is argued in *Hayek and Modern Liberalism* that Hayek has the “tendency to call anything grown and unplanned a spontaneous order” (Kukathas 1989, 202). It can be argued that it is Kukathas rather than Hayek who has this tendency.

<sup>29</sup> In MacCormick (1989, 48-49).



— and *not* merely the origin of this order — which differentiates a spontaneous order from an organizational order. If MacCormick and Kukathas imply that *any* institution which has “spontaneously” evolved is spontaneous order, then this is incorrect and does not follow from Hayek’s notion of spontaneous order. If this is their claim, then Hayek’s critics are conflating those institutions which have emerged through a “spontaneous” evolutionary process with those institutions which are generated by rules of spontaneous order. Again, it must be stressed that these are *not* necessarily identical.

#### 11. Hayek’s classical liberal critics: Gray and the “fictions” of mind

John Gray, in *Hayek on Liberty* (1986), believes Hayek’s evolutionary epistemology is fatally flawed because “the evolutionary trends of the human mind may well be leading us farther away from the truth”, for in “carving out an ecological niche” humans “may well have evolved a view of the world which [they] cannot transcend, but which embodies only fictions that have proved profitable to it across a long period of its history” (Gray 1986, 136). To put it succinctly, the problem is that under an evolutionary epistemology, there might be a “likelihood that the human mind, as it has been shaped by evolutionary pressure, in no way mirrors accurately the actual structure of the world” (Gray 1986, 136).

Is this, then, a valid critique of evolutionary epistemology? Perhaps not. Consider for the moment how Gray might have come to hold this view. Hayek comments that “since all we can ever learn from experience are generalizations about certain kinds of events, and since no number of instances can ever prove such a generalization, knowledge based entirely on experience may yet be entirely false” (Hayek 1952, 168). But “false” — to what mind? And at what point in time? Truth and falsity have meaning only *within* the framework of mind — within the so-called “fictions” of mind which exist at particular points in time. If Hayek is implying that an *individual’s* knowledge, based on experience, might be entirely false, then this is a meaningful assertion. Or if he is claiming that, from the perspective of *future* individuals who have different knowledge, our knowledge might be considered to be false, then this too is meaningful. But to extend this claim to *all* minds, however, is meaningless, for falsity necessarily conditions on the structure of *some* knowledge at some point in time. It seems, however, that Gray is interpreting Hayek in this third sense. Evolutionary trends may very well be leading mind “astray”; the question is how does Gray propose we overcome this? It is perhaps not obvious that Gray’s view of the question manifests Hayek’s

notion of a “*constructivist*”<sup>30</sup> form of rationality and hence is subject to Hayek’s numerous criticisms of that concept.

## 12. Response to Gray: the Hayekian concept of mind

“Truth”, for Gray, seems to be a notion which exists independent of a mind which has itself evolved. To claim that mind “embodies fictions” which have been “profitable to it” is to implicitly believe that one can recognize these “fictions” — and *how* would one do that? In other words, according to *which* perspective are they false? The question, then, is not whether the human mind accurately mirrors the “actual” structure of the world, but rather whether the notion of an “actual” structure to the world has any meaning at all if we do not condition on an evolved order of mind. That there does not exist truth or meaning which is independent of the evolved structure of mind is the central proposition of a Hayekian evolutionary epistemology. On this view, separating the “true” world from the world of “fictions” would have to be based upon values and knowledge which have themselves evolved. If this is the case, how would one know that this separation is not itself a “fiction”? By a further set of values and knowledge? It should be obvious that Gray’s critique rests upon the implicit assumption that there is a stopping point to this regress, and that at some point there is something external to this process which can be used to distinguish between truth and fictions, but which cannot itself be so distinguished. And is this “something” not the same foundation upon which Gray’s notion of truth rests, and which leads Gray to criticize evolutionary epistemology as flawed, for evolutionary pressures might lead the human mind away from truth?

Gray does not seem to realize that within an evolutionary epistemology, judgments, be they of truth or of any other kind, must always take as a given the evolved order of mind. Mind cannot rise above its own evolved structure and seek the “objective” truth — the “actual” structure of the world — independent of the system of ongoing actions which give it its meaning and condition its structure. There is no recognition of truth or fictions independent of the evolved structure of mind, and hence it is meaningless to speak of the “actual” structure of the world independent of a mind which makes this meaningful. Gray criticizes evolutionary epistemology because “evolutionary trends may be leading us further

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<sup>30</sup> For a detailed discussion of this notion of rationality see Hayek (1967, 82-95).

away from truth" (Gray 1986, 136), but he cannot account for our presupposed ability to distinguish between the two, nor can he account for how such a claim could be intelligible, without presupposing the existence of a mind which stands outside the evolutionary process. Thus, Gray's criticism is implicitly presupposing that at least some part of mind stands outside the evolutionary process and that this "core" represents a "fixed point" in judgment space which can distinguish between the "actual" structure of the world and that which merely seems to be the case (i.e. the structure of the world from the point of view of the evolved mind). Moreover, it would seem that such a mind could distinguish between the "actual" structure of the world and our merely provisionally evolved knowledge of it — for otherwise, how could we know whether we were approaching truth or heading away from it, and hence how could we know whether Gray's criticism of an evolutionary epistemology had any force or meaning?

It is put forward that Gray's criticism implicitly assumes that such a distinction could be made and that it is intelligible to speak of truth-claims over the actual world as distinct from truth-claims over the world that we know through our evolved minds. Yet it is precisely the point of evolutionary epistemology to deny this, and to deny that truth-claims can be made which distinguish between an "actual" world and that which is known by our minds, which are themselves the product of an evolutionary process. Thus, Gray's criticism is based on an implicit theory of mind which is directly contrary to a Hayekian evolutionary epistemology. Under the latter, judgments of truth require that we take as given the evolved structure of mind, and hence Gray's criticism of evolutionary epistemology dismisses the problem such an approach sets out to address by assuming the existence of a mind which can distinguish between the "true" world and that which is known using the evolved "fictions" of our minds. The Hayekian view, on the other hand, is that all knowledge and all judgment is based upon an evolved order of mind. Under an evolutionary epistemology, judgments which distinguish between the "actual" and "fictitious" world, and between truth and fiction, are always based on a mind which has itself evolved. The idea that mind, *constituted* of evolutionary "fictions", might be leading us away from truth, itself assumes that there is a way of distinguishing the "actual" world from that which is known by our evolved minds, and it is this assumption which an evolutionary epistemology explicitly rejects. The attempts of individuals to construct a more stable system of knowledge based on the standardization of mind's classification responses, or upon more stable methods of classification external to, and known in a derivative manner by, mind, are perhaps the best

we can do, but even these are only *relatively* more stable systems. The “actual” structure of the world which we can know always depends upon a mind which has itself evolved. Our view of the world is always an interpretation relative to the evolved structure of mind and, in the final analysis, it is one which we cannot transcend.

### 13. General critiques of Hayekian cultural evolution

As we saw in the previous chapter, it is sometimes argued that Hayek has not presented a suitably specific process for cultural evolution, and in particular, one which would allow for the evaluation of the products of cultural evolution.<sup>31</sup> Although this is to some degree correct, it must be qualified in the following manner. To be sure, Hayek does not discuss the specific selection processes which govern the evolution of culture in all of its areas. Such a task would be an enormous undertaking. As a consequence he is quite vague on the evolution of many aspects of culture. This is, however, not a feature of his thought alone but is rather a feature of the literature of the area at the time that he was writing. Research into *general* models of cultural evolution has only begun relatively recently, as is well documented in Boyd and Richerson (1985).

In some areas, however, Hayek *does* consider specific mechanisms of cultural evolution and selection, and it is one reflection of the lack of understanding of his work in this area that this has not been widely acknowledged or recognized. Hayek does consider the evolution of culture insofar as it manifests *conflict* — and this plays a central role in his investigations into the governance properties of market, legal, and political mechanisms. Consider his investigations into markets. Markets are mechanisms for resolving conflicts between particular preferences. They also have an evolutionary aspect to them, and can, under a Hayekian analysis, be viewed either as “discovery procedures”<sup>32</sup> or as selection filters (depending on how one chooses to view them). Or consider his analyses of political and legal mechanisms. Political mechanisms are also selection mechanisms, under which various policies are selected and others filtered out. Legal mechanisms are extremely complex judgment filtering mechanisms (as later chapters shall argue) and are designed to weed out certain types of conduct using a variety of filters. Now, as it is the purpose of the

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<sup>31</sup> See Gray (1986, 32) and (1986, 137-138), Buchanan’s comments in Gray (1986, 70), the criticisms in Tomlinson (1990, 47, 134) and in Rowland (1987, 40, 55). For another perspective on this, see the response made in the first chapter to Haworth’s similar objections.

<sup>32</sup> A term used by Hayek (1978, 179-190; 1979, 67-70).

remainder of this thesis to examine these issues, I will not go into this any further at the moment, save for a comment on the state of the critical debate in this area. It is somewhat discouraging to realize that many of Hayek's critics fail to understand both his arguments concerning cultural evolution and their implications. What is even more disturbing, however, is the apparent blindness to the fact that Hayek is *basing* his argument on evolutionary grounds. In other words, some of Hayek's critics seem oblivious to the fact that he is even *making* an evolutionary argument, and hence seem to be unaware that their own objections to the lack of evolutionary mechanisms can only be viewed with a certain perplexity by those adopting a Hayekian perspective.

There is another aspect to this line of thought which, though similar, is not identical to it. Some authors complain of Hayek's lack of suitable criteria for evaluating evolutionary products. This complaint, however, ignores important elements of Hayek's epistemology. His evolutionary epistemology emphasizes the importance of recognizing that *any* particular criterion will itself be evolving. If the criterion is evolving the notion of evaluating evolutionary processes will necessarily be incomplete — for what criterion could be used to evaluate the criterion itself?<sup>33</sup> Seen in this light, the criticism takes on a new meaning. If all criticism must be *within* a framework of unquestioned values then all criticism must be internal criticism; internal, that is, to the framework generated by these values. Now, it is not problematic for Hayek's epistemology to assume that one can *conditionally* evaluate the results of evolutionary processes, taking as unquestioned a set of values which are themselves evolving. In such a scenario, the criteria for evaluating the results of evolutionary processes would be the set of unquestioned values which are themselves the product of evolutionary processes. What would be problematic, and in some senses unintelligible under an evolutionary epistemology, would be the claim that there exists *unconditional* criteria which could be used to evaluate the products of evolution and which are not themselves subject to the process of evolution. Under a Hayekian framework, values are themselves a product of evolution that are neither necessarily conscious nor articulated. Values will, in many cases, have to be discovered by detailed investigation based on still other evolved (and evolving) values. It is the dependence of all analyses on unquestioned (and, in a sense, unquestionable) values which implies that, for Hayek, criticism is always

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<sup>33</sup> This is one instance of a much more general, Gödel-like, objection to the possibility of a "transcendent" criterion for evaluation and judgment. It might be noted that this objection is similar to one made by Hayek in a different context (Hayek 1967, 61-62).



within a framework of pre-existing values, most of which cannot be questioned without depending on still other unquestioned, and evolving, values.

In a related criticism, some authors claim that Hayek's work is plagued by its inability to identify specific institutions as well- or mal-adapted. Initially, this seems justifiable, but further reflection proves it to be as unjustifiable as the previous criticisms. To say that the large body of linguistic, legal, moral and scientific rules are, in general, well-adapted rules is to state what many people would consider to be obvious. *Particular* rules within these sets may be mal-adapted, but it has to be noted that this is a separate issue from the mal-adaptedness of the set as a whole. Constructing a rational argument that would be capable of demonstrating that the entire system was well-adapted would, by contrast (to evaluations of individual rules *within* the system), be much more difficult, if not impossible. We are not free to rationally evaluate systems of rules in any way we see fit, for there is an obvious problem in ascertaining the measure against which we can evaluate them. This is not, however, the only difficulty, nor is it necessarily the most important one. An issue that is sometimes overlooked, but which might be of fundamental importance, is the relationship between the institution under evaluation, and the evaluation criterion itself. If it should turn out to be the case that the institution in question performs functions which are in some sense essential to the evaluation criterion itself, and these functions were intimately tied to the institution such that the elimination of the latter implied the elimination of the former, then one's criticisms of the institution would be limited to those which do not endanger these essential functions. If one's criticisms extended to these essential functions, one would in a sense be committing a form of cybernetic contradiction. This is, perhaps, what lies behind Hayek's insistence on immanent criticism, the idea being that meaningful reform must always take place *within* systems of ongoing orders of action, only certain aspects of which can be meaningfully questioned, as other aspects of these orders form the foundation for the possibility of asking any meaningful questions at all.<sup>34</sup>

#### 14. Conclusion

This chapter has attempted to restate Hayek's theory of cultural evolution and to counter certain criticisms of this theory which have emerged from within the classical liberal

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<sup>34</sup> For more on this see Hayek (1976, 24).

tradition. It has emphasized that Hayekian cultural evolution is not Darwinian, and that Hayek's claim that there are no laws of evolution is intelligible, if not incontestable. It has also tried to explain his emphasis on decentralized evolution, and a reliance on sets of rules, as being based upon a concern for the adaptiveness of conduct in situations of informational and performative complexity. It is hoped that this chapter has, at least partially, managed to correct some of the more obvious misconceptions concerning Hayek's theory.

In the following chapter, a particular cybernetic selection process is examined. The chapter will outline Adam Smith's construct, the impartial spectator, and the mutual sympathy mechanism which underlies it. The properties of the mechanism and its products are examined and related to the notion of negative justice and negative rules of conduct. Chapters four and five will continue, and expand upon, the discussion of this chapter, with the former examining some of the mechanisms of reasoning, while the latter focuses upon the distinction between negative and positive rules.

## Rule-Generating Mechanisms, Part I

### Adam Smith's impartial spectator and the mutual sympathy mechanism

#### 1. Introduction

The previous chapter outlined the general framework of a Hayekian theory of cultural evolution. This chapter will consider the moral theory of Adam Smith from the perspective of its elaboration in Knud Haakonssen's *The Science of a Legislator* (1981). The focus of the chapter is on the process underlying this theory: the mutual sympathy mechanism. As will be seen, this is a very useful construct, and feeds directly into some of the major concerns of a Hayekian theory, including the evolution of cultural norms and the generation of objective abstract rules. Such a process can and should be integrated into a Hayekian social theory, and it is the goal of this chapter to demonstrate one way in which this might be done. The plan of the chapter, then, is to outline Adam Smith's mutual sympathy mechanism and the theory of the impartial spectator which emerges from this mechanism as an example of an interactive feedback mechanism which is capable of generating abstract rules of conduct. Central to this explanation is a fleshing out of Smith's notion of sympathy, which forms the basis for the mutual sympathy mechanism and its resultant construct, the impartial spectator. Following this is a discussion of two of the properties of rules which emerge from the application of the mutual sympathy mechanism: their relative objectivity and their negativity. The chapter ends with a look forward to the more detailed discussions of reasoning and negativity in the chapters which follow.

#### 2. Sympathy and the mutual sympathy mechanism

Adam Smith's *Theory of Moral Sentiments* (1776) is based upon two theoretical constructs. The first is the *impartial spectator*. The second, which provides the foundation for Smith's impartial spectator model, is his notion of *sympathy*. How would one characterize this notion? Consider the summary given by Haakonssen of how Smith built

upon Hume's notion of sympathy. Hume's idea was that "when [an individual] perceives the expressions of a passion in another [individual], [they] form an idea of this passion on the basis of [their] own earlier experience, and this idea is turned into an impression, that is, into a passion similar to the original one in the other person" (Haakonssen 1981, 46). What Smith did was to "broaden the causal factors in the creation of the sympathetic reaction of the spectator to *include* the situation in which the original passion and its expression occurred" (Haakonssen 1981, 46). Thus, "[s]ympathy...does not arise so much from the view of the passion, as from that of the situation which excites it" (Smith 1976, 12, quoted in Haakonssen 1981, 46). There is thus "a distinction between the *object* of sympathy, which is another [individual's] passion, and the *cause* of sympathy, which is the whole situation that gives rise to the original passion" (Haakonssen 1981, 46). This is of decisive importance because it allows for the "possibility that the spectator can say what the original passion *should have been* according to [their] view of the situation" (Haakonssen 1981, 46). Hence, "to be able to judge is to be able to know the situation, and hence the ideal of the impartial and informed spectator" (Haakonssen 1981, 47). What is of decisive importance here is that situations will be knowable to different degrees, depending on the type of knowledge and information which is available. Thus, in some situations one will be able to judge in greater detail than in others.

What aspects of sympathy are most relevant to the discussion of this chapter? There are three aspects of some importance. First, sympathy is something interpersonal (Smith 1976, 109-111), mutual between individuals (Haakonssen 1981, 52). It is not merely how sympathy extends out from an individual or how one receives it. Rather, it is the interplay between the two forms which is of decisive importance. Following Haakonssen's usage this interplay of sympathies shall be termed the *mutual sympathy mechanism*. The second aspect of importance is that sympathy is a process (a mechanism). It is not so much the *results* of this process as the fact that everyone will be using this same process which is of decisive importance for Smith's impartial spectator (Haakonssen 1981, 55). The third aspect to stress is that this process is a *selection mechanism*, whereby "behaviour which is not fitted will tend to be weeded out by means of antipathy conveyed through the mutual sympathy mechanism, whereas behaviour which is fitting will tend to be reinforced by approval conveyed in the same way" (Haakonssen 1981, 59). All three of these aspects are related to a Hayekian theory. In essence, the mutual sympathy mechanism is a dynamic interactive feedback system which provides a framework for the workings of the evolution of culture

and the generation of rules of conduct. As one has seen in previous chapters, the evolution of culture is a matter of some concern for Hayek. In addition, Smith's mechanism is in principle capable of generating relatively objective judgments. That this is a pressing concern to Hayek will be documented in some detail in later chapters, particularly the one which focuses on his objections to certain notions of distributive justice. It seems, then, that there is a strong element of accord between the theory of Smith and the goals of Hayek.

But what, then, are the specifics of the mutual sympathy mechanism? It follows a three-step process. Imagine you are in a situation where you are going to make a moral judgment. How does one come to an impartial judgment? The mutual sympathy mechanism would proceed as follows: first, you try to imagine how a spectator would view the situation; second, you try to imagine the degree to which this imagined spectator could put themselves in your situation; and third, you try to imagine the judgment of the spectator who has put themselves into your situation (Haakonssen 1981, 54). Putting it another way, what "viewing ourselves as others view us" means is that we strip away all the knowledge and information which is not accessible to outsiders and use, as grounds for judgment, only that which *could* be held in common by some abstract observer. It is important to note what is *not* being claimed. Smith is not claiming that the impartial spectator, generated by the process of mutual sympathy, would come to the same judgments as an *actual* spectator. Mutual sympathy is an abstraction, an act of imagination, and thus depends upon the particular interests, passions, knowledge and information of the judging individual. It is possible, then, that different individuals might, if faced by the same environment, generate many different impartial spectators.

### 3. The generation of objectivity

One might be wondering at this point how it is that the judgments of the various impartial spectators come to converge? That is, how does moral judgment come to be objective? Smith's answer to this would be that objectivity is an unintended by-product of the mutual sympathy process.<sup>1</sup> Objectivity arises through the stripping away of arbitrary, person-specific detail which occurs at each step of the mutual sympathy mechanism. By trying to view yourself as others view you, you must eliminate any knowledge which is

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<sup>1</sup> As pointed out in Haakonssen (1981, 55).



known only to yourself. This implies you must consider the degree to which others could enter into your situation *as spectators* (i.e. without your specific knowledge). Thus, the judgment which is made, based on the idea of spectators who can only to a limited degree enter into your situation, is objective to the degree that the knowledge and information upon which a decision would be based would be that which *could* be shared by the participant and a *potential* observer. Moral judgment is thus different from the actual judgment of existing spectators in that the impartial spectator bases judgment upon what a potential spectator *could* know, and not upon what actual spectators *do* know. By this process, then, information which is idiosyncratic, individual-specific, and known by only particular individuals is eliminated as grounds for objective moral judgment (Haakonssen 1981, 57). Of course, this does not imply that moral judgments *will* be objective, but merely that this method is the way in which they *strive* to be. In fact, it is the differing information/knowledge requirements and the assumptions of individuals about the knowledge of the impartial spectator that spurs on the growth of morality. It is the relative degree to which individuals hold different views of the knowledge of the impartial spectator that determines the *relative* objectivity of the judgments of that spectator. The differences between each individual's notion of the impartial spectator also makes it possible for an individual to evaluate the judgments of *others* and to say what they *should* have been (relative to that particular individual's notion of the impartial spectator, of course).

The mutual sympathy mechanism thus in some senses imposes a criterion which separates objective from subjective knowledge. The striving to achieve an impartial spectator perspective acts as a filter over person-specific knowledge, leaving objective knowledge as the basis of a judgment. In this sense, then, the impartial spectator perspective and, perhaps more importantly, the mutual sympathy mechanism, form a criterion for distinguishing which knowledge is to be considered relevant to an impartial decision.

It might be argued, contrary to this view, that the impartial spectator ideal embodies a notion of an "ideally-informed" but imaginary spectator who would know which information was relevant and which was not.<sup>2</sup> On this view, it is to *this* spectator that individuals appeal when trying to come to an impartial judgment.<sup>3</sup> How, then, is this notion

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<sup>2</sup> I thank Neil MacCormick for raising this point.

<sup>3</sup> John Rawls, in his *A Theory of Justice*, seems to argue for such an interpretation. On this view, which Rawls claims is "reminiscent" of the views of Hume or Smith (Rawls 1971, 184), the impartial spectator is described as "endowed with ideal powers" and as a "perfectly rational individual who identifies with and experiences the desires of others as if these desires were [their] own" (Rawls 1971, 27). In this way, then, this

of the impartial spectator ideal related to the one of this chapter? Implicit within such a notion is the idea that the problem of relevancy has *already* been solved, in that such a spectator already knows what is relevant and what is not. The question which this raises, however, is *how* this crucial distinction comes to exist. In other words, by what criterion does the impartial spectator come to have this knowledge? This view of the impartial spectator seems to assume, as previously stated, that this problem has already been solved, and implies that there has already been a separation of the partial from the impartial. The question which remains, however, is by which mechanisms, and under what criterion, does such a separation come to exist? The argument of this chapter is that it is the mutual sympathy mechanism which puts into effect the separation criterion of whether or not the knowledge would be shared by an imaginary observer put into the situation faced by the individual. Thus, it is the *overlap* between the individual's and the impartial spectator's perspective which forms the dividing line between the partial and the impartial.

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impartial spectator "ascertains the intensity of these desires and assigns them their appropriate weight in...one system of desire" (Rawls 1971, 27, my italics). Notions of what is right emerge when "an ideally rational and impartial spectator would approve of it from a general point of view should [they] possess all the relevant knowledge of the circumstances" (Rawls 1971, 184). That there are many difficulties with such an interpretation is perhaps obvious, as Rawls himself notes when he comments that it is questionable whether the notion of "relevant knowledge can be specified without circularity" (Rawls 1971, 184). From the point of view of this chapter, what is important to note is that Rawls is concerned for the most part with criticizing utilitarian visions of judgment, and hence Rawls' discussion views the impartial spectator construct as an aggregation and filtering mechanism over different individual perspectives. On this view, the impartial spectator is able to encompass different individuals' views, gauge their intensities, and assign them a weight in a *single* framework of valuation — the impartial spectator's. From the point of view of the discussion of this chapter, this conception of the impartial spectator is objectionable for a variety of reasons. First, Rawls' discussion seems to overlook the fact that different individuals might arrive at different impartial spectators. There is nothing in Smith's notion of the impartial spectator that guarantees the *same* impartial spectator construct will exist for each and every individual. Second, there is no reason to believe that an impartial spectator will be able to incorporate every individuals' desires and views into a single coherent and consistent framework. There are many difficulties in combining individual perspectives into a coherent single vision, even if one takes a narrow view of perspectives, such as that provided by "public choice" economics, with which Rawls was no doubt familiar (as is evidenced by his references to it in his work). See, for example, the discussion of combining individual frameworks into a coherent whole provided by Arrow (1951) and the summary of these difficulties in Mueller (1989, 373-441). If one were to try and by-pass these difficulties, and simply assume the existence of a rank-ordering which could resolve conflicts between the desires of different individuals, the questions remain — from where does this rank-ordering originate, and how can individuals know what it is? Third, and finally, Rawls is right to question whether the definition of the impartial spectator that he provides might not be circular. That it follows from the insight that the impartial spectator is the *resultant* construct of a process (the mutual sympathy process) which separates relevant from irrelevant knowledge and generates a notion of impartiality. It is probably more accurate to say that it is not the choices of the impartial spectator that determine what is relevant and irrelevant to deciding impartially, but rather that it is the process of the mutual sympathy mechanism which leads to the formation of an impartial spectator position under which the notion of impartiality, and those aspects which are relevant to it, obtain their content. In this sense, then, the impartial spectator position is an artefact which contains knowledge relevant to impartial judgments because of the way it was constructed. This is, perhaps, the main objection to the Rawlsian notion of the impartial spectator position, and it is elaborated in greater depth in the main text above.

The argument that there is an “ideally-informed” impartial spectator, must in the same way adopt some mechanism and criterion for separating the partial from the impartial. The question which this position must address, therefore, is how this separation is made. This question is not answered by simply assuming that individuals have an ideal in mind, for the issue is precisely how this ideal comes to be formed. My view is that it is incumbent upon those who argue for an “ideally-informed” impartial spectator to spell out not only the grounds for such a separation, but also the mechanisms whereby such a separation comes into existence. The argument of this chapter, rather than focusing on the impartial spectator as a pre-existing criterion of relevancy (i.e. as a state of being), emphasizes the *process* whereby a perspective *becomes* impartial. Thus, the striving towards the impartial spectator ideal, and the mutual sympathy mechanism which underlies it, are viewed as the processes under which impartiality is generated, in contrast to the view which takes the impartial spectator as a given and then focuses on its application to specific circumstances.

To summarize, then: in this chapter, the mutual sympathy mechanism is a filtering process under which one strives to achieve an impartial spectator perspective. The argument for an “ideally-informed” impartial spectator in effect assumes that the mutual sympathy mechanism has *already* performed its task and generated such an “ideally-informed” perspective. If, however, one is interested to investigate how the partial *becomes* impartial, it does not further the investigation to assume that there already exists some “ideal” perspective which can perform this task.

One final aspect of Smith’s theory is of some interest. He argues that general rules of judgment are the *product* of the mutual sympathy selection process. As Smith puts it

We do not originally approve or condemn particular actions, because, upon examination, they appear to be agreeable or inconsistent with a certain general rule. The general rule, on the contrary, is formed by finding from experience that all actions of a certain kind, or circumstanced in a certain manner, are approved of. (Smith 1976, 159)

Put differently, abstract rules of morality grow from numerous particular instances of evaluation.<sup>4</sup> Abstract rules do not pre-exist these evaluations but instead grow up out of them, in a social environment in which one generates moral rules based on the evaluations

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<sup>4</sup> Of course, this presupposes that, at a minimum, general values and beliefs *pre-exist* such particular acts of evaluation and provide the foundations upon which such evaluations are made (though it is important to keep in mind that the terms “values” and “beliefs” are not necessarily being used in their conscious sense). How these values and beliefs might come to exist and are sustained forms much of the discussion of the final chapter of this thesis.

of others. Given this assumption about the nature of the growth of moral rules, Smith also claims that the rules of judgment which evolve under the mutual sympathy mechanism will be generally well-adapted to their particular environment.<sup>5</sup> What this means is that “behaviour which is not so fitted will tend to be weeded out by means of antipathy conveyed through the mutual sympathy mechanism, whereas behaviour which is fitting will tend to be reinforced by approval conveyed in the same way” (Haakonssen 1981, 59).

#### 4. The properties of rules generated by the mutual sympathy mechanism

What are the properties of rules which have been generated in this way? Does the assumption of a mutual sympathy mechanism and its generation of an impartial spectator have any implications for the nature of the rules of judgment which emerge? There are two aspects which need to be considered, and these form the topics of the sections and two of the chapters which follow. The first is the relative objectivity of the rules which emerge from the process. As discussed above, the mutual sympathy mechanism can potentially generate objective rules of judgment. What this means is that there is the potential under this mechanism for the generation of rules which overlap to a large degree between individuals and which can produce similar judgments regardless of the individual which is actually performing the particular judgment. This independence from the particulars of individuals is the essence of objective judgment within the framework of this thesis.

The second aspect of some importance to this analysis is the negative nature of the rules which emerge. “Negative” in Smith’s sense flows from a rule being primarily focused on harmful effects (Haakonssen 1981, 83-87). In other words, “negative” refers to rules which govern situations which are undesirable. This is not, however, the only sense of the term “negative” which might be employed. One might describe, as Hayek does, rules which prescribe conduct to be performed as “positive”, and rules which prohibit conduct as “negative”.<sup>6</sup> Both of these senses of the term “negative” will be discussed in much greater depth in the section on negative justice and the chapter on negative rules which follow. These argue that there is an intimate connection between the two senses of the word and hence between Smith’s emphasis on the primacy of the negative nature of justice (in the

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<sup>5</sup> See Haakonssen (1977, 59).

<sup>6</sup> For example, in *Law, Legislation and Liberty* (1976, 26, 36).



sense of its association with undesirable outcomes) and on Hayek's emphasis on negative, prohibitory, rules of conduct.

## 5. Smith's concept of negativity

The sections which follow examine Smith's conceptions of negativity. They argue that the mutual sympathy mechanism generates rules which are to a large extent negative, both in the sense of being related to undesirable outcomes, and in the sense of being solely prohibitive. An argument is then made that Smith's notion of negativity is related to the idea of necessary (as opposed to sufficient) conditions, with the argument being that there is a fundamental relationship between the idea of informational and performative requirements of a mechanism and the type of rules which provide its foundation. The chapter ends with a discussion of the relationship between Smith and Hayek, and with a glance forward to a more detailed discussion of the differences between negative (prohibitive) and positive (performance requiring) rules.

## 6. Smith on negativity and the argument from necessity and sufficiency

The sections on Smith's mutual sympathy mechanism and impartial spectator pointed out that "negative" in Smith's sense derives from a rule being focused on displeasure, on harm, and on actions which are negative in the sense that they produce undesirable results. Smith gives two reasons for his emphasis on undesirable results. First, Smith argues that pain and displeasure are stronger and longer lasting feelings than pleasurable ones (Haakonssen 1981, 83-84). He claims the reason for this is evolutionary, i.e. it is pain and not pleasure which has the highest survival value for us. Pain deters us from that which might end our lives and hence is very important from the standpoint of survival, whilst pleasure is an addition to survival and hence not as valuable from an evolutionary perspective. Second, and following from this, Smith believes that pain and displeasure are more universally shared than are feelings of pleasure (Haakonssen 1981, 85-86).

One can extend Smith's evolutionary argument in the following way. It can be argued that the reason that negative feelings are stronger, of longer duration, and more universal is *because* they arise from the violation of rules which constitute minimal *necessary* conditions for ordered social life. Pleasurable feelings, on the other hand, *presuppose* the



satisfaction of necessary conditions and hence are an *additional* requirement to be satisfied. In a way, then, pleasure arises from the satisfaction of rules which constitute *sufficient* conditions for a satisfactory social life. As I shall argue below, the difference between the two types of feelings are based in part on the differences in environmental *complexity* upon which they depend.

Returning to the discussion of the mutual sympathy mechanism, the essence of the argument is that the mutual sympathy mechanism will generate a set of rules concerned, for the most part, with necessary conditions. This needs to be fleshed out. What is being argued is that necessary conditions represent less complex conditions than do sufficient conditions because sufficient conditions presuppose the satisfaction of necessary conditions. As a result, mechanisms which strip off person-specific information and knowledge and aspire to objective grounds for judgment will tend to generate rules which are in large part dealing with necessary conditions.

Consider the following rules as representative of the necessary and sufficient conditions for Y. If A is necessary for Y then one may formulate a rule as

- (i) only if A, then Y possible,
- or (ii) if no A, then no Y,
- or (iii) if no A, then Y impossible.<sup>7</sup>

If X is sufficient for Y then we have

if X, then Y.<sup>8</sup>

What is not mentioned in the above is that *if* the necessary conditions are satisfied, the sufficient conditions can also be written as

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<sup>7</sup> This formulation is a general one. One could reformulate this as "if no A, then Y impossible", where A={B, C, and D}, or A={B, C, or D} with little difficulty, thus extending the rules to cover multiple causes and the cases of intersection or union. What one sees is that the set of exclusionary preconditions for Y — the conditions without which Y is excluded — has expanded. However, the preconditions are still essentially exclusionary in that without a member of the precondition set, Y will be impossible.

<sup>8</sup> Again, this formulation is a general one. One could reformulate this as "if X, then Y", where X={B, C, and D}, or X={B, C, or D}. And once again, the set of preconditions for Y has expanded. However, these preconditions remain non-exclusionary in that the absence of either B, C or D, or indeed all three, does not preclude the possibility of Y.

if *X and A*, then *Y*.

The assumption that *X* is sufficient for *Y* must necessarily presuppose that *A* has also been satisfied. If this were not the case, *X* could not be sufficient for *Y* because the necessary conditions for *Y* — in this case, *A* — would not be satisfied. Thus, sufficient conditions are in this case based upon a foundation of necessary ones, and in this sense the satisfaction of necessary conditions is presupposed by all sufficiency claims. The argument which flows from the above analysis is quite simple. Sufficient conditions are more complex and hence more demanding because they presuppose the satisfaction of certain necessary conditions. In a sense, sufficient conditions build upon a foundation of necessity. If one tries to test a claim of necessity one is not presupposing a sufficiency requirement. But the reverse does not hold. Necessary conditions are always taken as a given by sufficiency conditions. A mechanism which generates relatively objective rules of judgment will strip away individual specific knowledge and information and leave as a remainder aspects which are shared in common — which overlap to varying degrees — across individuals. As pointed out above, the mutual sympathy mechanism is one such process which strips away knowledge and information which is particular to certain individuals but which would not be available to an impartial spectator. A complete information set which would allow someone to judge the conduct of an individual would consist of both the conditions which were necessary for the action to take place (these are usually presupposed) and the sufficient conditions which actually led to the action. The stripping away of idiosyncratic detail by the mutual sympathy mechanism eliminates certain information and knowledge. This knowledge is constituted of sufficient conditions (the specific knowledge/information which generated the particular act), for it is often not accessible to outside observers, depending as it does on, for example, the disposition of the individual, their specific knowledge, feelings, etc.. What is certain to remain, however, are those aspects which are widely held and those aspects which are seen as essential preconditions (and hence presuppositions) of any action at all. What remains, then, is commonly held knowledge and a set of necessary conditions for action.

## 7. The relationship between undesirable outcomes and prohibitive rules

The discussion concerning necessary and sufficient conditions made an evolutionary argument for a connection between undesirable states of affairs and necessary conditions. On this argument, necessary conditions are focused upon harmful outcomes. Rules governing such outcomes would, therefore be “negative” in Adam Smith’s sense of that word. This section seeks to address a further relationship between negative, in the sense of harmful, and negative in the sense of prohibitive. The argument will be that not only is there a relationship between necessary conditions and harmful outcomes, but also that there is a connection between harmful outcomes and prohibitive rules.

Why, one might ask, should harmful states of affairs be associated with the violation of rules of conduct which prohibit certain forms of conduct? The answers are related to informational and performative complexity. The question would probably be more informative if one asked why one would want to frame rules relating to necessary conditions and harmful states in such a way so as to impose only prohibitions. In other words, why would one be interested in framing the rules of a conduct governance mechanism in terms of violations of negative rules rather than in terms of the fulfilment of positive ones?

As is pointed out in the chapters which follow, there are a variety of reasons why one might want to focus on rules which do not impose obligations to act or on rules which prohibit conduct rather than on rules which prescribe actions to be performed. I will not rehearse those arguments here. However, I will consider some additional arguments which might be made for this choice. For the moment, then, consider the following. If a necessary condition relates to an undesirable action (or state) one does not want this action (or state) to occur or to continue to exist. This provides a link between harmful states and rules of conduct, for one might either prohibit the actions which lead to the undesirable condition or, on the other hand, impose the requirement that if these states occur, action must be taken to eliminate them. The argument for resorting to negative rules which is set out below is that such rules are more amenable to referring to the relatively well-defined and separable actions of a single individual than are positive rules, which are more heavily dependent upon references to a nexus of actions which rely upon coordination with, or which condition upon, the actions of *other* individuals. A rule referring to group action typically requires more coordination between individuals and hence is typically more complex.

Note that none of this implies that prohibitions are less complex than prescriptions of performance *if* they are equally simple to satisfy. The question is, of course, whether rules expressing prohibitions and prescriptions of performance satisfy this condition. The answer to this question is, of course, that both prohibitive and conduct-prescribing rules vary in their complexity. Rules which oblige one to perform acts can be addressed to single individuals, and do not necessarily imply obligations *between* individuals. However, in many cases imposing an obligation to act in order to eliminate an undesirable state creates more complexity than simply prohibiting individual action.<sup>9</sup> The reason for this is that in the cases where someone is in an undesirable state and cannot leave it without the help of another, an obligation to act might be imposed on someone to assist them in escaping it. If such an obligation is owed, this must presuppose some mechanism for resolving which particular individuals owe which obligation to which other individuals in which situations. It is the presupposition that such a mechanism exists which renders duties owed to others relatively more complex than simple prohibitions. Simple prohibitions require that one attempt to control oneself but do not require a transfer of one's actions — or the results of one's actions — to another. Rather, they call for the opposite — that such a transfer *not* take place. In a sense, then, the obligation to control oneself is an obligation to all. Obligations to others, on the other hand, require transfers, and any such transfers presuppose that there is a mechanism for resolving the complexities of such transfers.

Return now to the discussion of the mutual sympathy mechanism. The essence of the argument is that the mutual sympathy mechanism generates a set of rules concerned for the most part with necessary conditions. These conditions are, generally speaking, concerned with harmful states of affairs. Now, for these states of affairs to come about there must be either certain conduct which we desire to occur or certain conduct which we do not want to occur. If a necessary condition refers to actions which one does not desire one can either prohibit the actions which lead to the condition occurring or one can impose an obligation to eliminate the condition if it occurs. The discussion above points out that the former is in many cases informationally and performatively less demanding than the latter (so long as it refers to prohibitions of individual, as opposed to group, conduct). Hence, a selection mechanism which is sensitive to the informational and performative complexity of rules will be more likely to select rules which prohibit conduct rather than require its performance.

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<sup>9</sup> As pointed out in Hayek (1976, 36).

## 8. Rules of conduct and rules referring to states of affairs

There is one essential qualification which must be added to the discussion above. Return for the moment to the discussion of necessary and sufficient conditions. It is important to realize that these conditions can be satisfied by either states of affairs or conduct. The focus of attention in this and later chapters is upon the latter, for the following reason. The work examines obligations upon individual conduct. The obligations associated with states of affairs are based upon *conduct* which could and should (a) sustain or eliminate an *ongoing* state of affairs or (b) generate or refrain from generating a *potential* state of affairs. In this work, obligations are obligations over conduct.

Consider for a moment necessary conditions relating to states of affairs. Though it is certainly meaningful to discuss necessary conditions as states of affairs and to ignore the way in which these conditions come to exist (or come to be eliminated from existence), it is not meaningful to assert that *obligations* exist over these states of affairs without referring at least implicitly to the *way* in which these states of affairs come into existence. Obligations necessarily refer to forms of conduct which can either sustain, bring about or eliminate certain states of affairs.

The focus of this work is on the mechanisms under which obligations are put into effect. This in turn leads to an examination of different governance mechanisms under which obligations take on different forms. The obligations mechanisms of particular interest in this work are those based on governance by abstract rules of conduct. As I shall argue in the remainder of this chapter and in the whole of chapter five, when one turns to a consideration of abstract rule-based conduct governance mechanisms there is an important distinction to be made between rules demanding the performance of conduct and those which demand that one refrain from certain forms of conduct. This is the distinction between “positive” and “negative” rules of conduct. It is of decisive importance that one keep in mind that the terms “positive” and “negative” as used in the remainder of this work refer to *conduct*, i.e. to the performance or prohibition of certain forms of conduct. In particular, these terms do *not* refer to the demand for (or elimination of) states of affairs. This type of demand would constitute another sense of the terms “positive” and “negative”, and one that is quite different from the usage of this thesis. The sense of “positive” and “negative” associated with states of affairs is the one which is connected to descriptive rules, and is the same one that Adam Smith uses when he attributes “positive” to desired states of affairs (or *effects* of



conduct) and “negative” to undesirable states. Though this is an important and valid use of the terms “positive” and “negative”, it is crucial to realize that this is not the sense in which this thesis considers rules of *conduct* to be positive or negative.

It is important to be clear on this point, for the obligations implied by the different notions of “positive” and “negative” have substantially different implications for the *form* of obligation over individuals’ conduct.<sup>10</sup> Consider prohibitive rules. Rules which prohibit conduct deal explicitly with conduct. If, on the other hand, one is referring to a rule which prohibits a state of affairs, its effect on conduct is less obvious. The central question is this: is one under an obligation to act, or to refrain from action? Must one perform certain acts such that the state of affairs does not come about? Or must one refrain from performing certain conduct so that a state of affairs does not come about? Prohibitions of states of affairs can lead to obligations to perform certain conduct, or they can lead to obligations to refrain from certain conduct. Such a gap between rules and obligations is precisely the problem with resorting to rules which refer to states of affairs. This fundamental ambiguity concerning rules prohibiting states of affairs — in that such “prohibitory” rules do not necessarily prohibit *conduct*, nor do they necessarily imply prohibitive obligations — is one reason why this thesis applies the terms “positive” and “negative” solely to rules of conduct. If one is focusing on obligations — as this thesis does — then it is preferable to examine the relationship between different forms of the obligations and their effects on conduct, rather than resorting to inferring a connection between undesirable states of affairs, obligations arising from this undesirability, and the effect of these obligations on conduct. In a sense, then, prohibitions of states of affairs are only indirectly related to conduct, and it is this indirectness which allows for ambiguity in the relationship between a prohibition on state of affairs and its effect on obligations and conduct. As the focus of this work is on conduct governance mechanisms, and in particular those based upon rules of conduct, it is important to be clear that within this thesis the terms “positive” and “negative” are attributions made to rules of *conduct*.

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<sup>10</sup> This is one of the central arguments of chapter five, which focuses on the governance properties of negative rules of conduct.

## 9. Negative justice: the connection between Smith and Hayek

All of this is related to Adam Smith's argument that justice is for the most part concerned with undesirable outcomes. It also forms the connection between Smith's notion of negative justice, which is concerned with undesirable outcomes, and Hayek's, which focuses on rules which do not require performance of an act, or equivalently, which only prohibit conduct. Both Smith and Hayek are noted for having a negative conception of justice. These conceptions are, however, not identical. For Smith, the negativity of justice flows from its concern being primarily focused on displeasure, on harm, and on actions which are negative in the sense that they produce undesirable results. To Hayek, on the other hand, justice is negative because it cannot be given positive content, in the sense that justice is concerned with what one should not do, rather than with what one should do. On this view, justice being negative refers to the fact that for the most part the rules of justice are negative. It does not refer to the fact that the rules are concerned with outcomes which might be thought to be undesirable.<sup>11</sup>

Return for the moment to the idea of the impartial spectator and the mutual sympathy mechanism. This mechanism is interactive and feedback-based, with a continual interaction and adjustment taking place and generating rules of moral judgment. This is one mechanism which could be used to generate rules of conduct and rules of justice. Smith's argument is that the rules of justice are in large part negative in the sense that they are connected to undesirable outcomes. In addition, an argument has been made that undesirable outcomes are, for reasons of informational and performative complexity, associated with the generation of predominantly negative rules in the sense of rules which do not prescribe conduct to be performed or which prohibit forms of conduct. It is the connection between undesirable outcomes and rules which do not prescribe conduct to be performed or prohibit acts which links Smith's conception of justice to Hayek's.

Consider, then, Hayek's emphasis on negative justice. Hayek's focus is mainly upon the necessary conditions for social order and is for the most part concerned with prohibitive rules and those which do not prescribe conduct to be performed. Why does Hayek adopt this perspective? The argument would be that rules should be prohibitive or at least not prescribe conduct to be performed because of the connection between these types of mechanisms and

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<sup>11</sup> As in Hayek (1979, 130-131).

the types of society they are capable of sustaining. The Hayekian argument is that there are fundamental differences between positive and negative rules of conduct and the associated conditions for their satisfaction. As it is the task of a later chapter to elaborate on these differences, I will not go into their details at the moment, but will instead present only a summary outline of the discussion. Briefly put, then, these differences flow from the fact that a negative rule of conduct must be continually satisfied if it is to be satisfied at all; a positive rule of conduct must be satisfied at a particular point in time and space. Hence, a negative rule of conduct imposes a condition which applies more generally across time and space than does a positive rule of conduct. If this is the case, then in this respect a negative rule of conduct will be more *abstract* (in the sense of the temporal and spatial specificity of its reference) than a positive rule of conduct.<sup>12</sup> Based on this difference in degree of abstraction, the Hayekian argument is that, generally speaking, negative rules of conduct are better adapted to governing conduct in complex, *Gesellschaft*-type societies than are positive rules of conduct.

If this is the case (and for the purposes of the present discussion I shall assume that it is),<sup>13</sup> it might explain Hayek's generally critical attitude towards normative constructs based on positive (performance requiring) notions of rules. In this context, Hayek's critique of the notion of rights might prove a useful example.<sup>14</sup> Negative rules of conduct govern what may be termed negative rights. What this means is that they rule out certain forms of action which might impinge upon other individuals. These rights are "standing obligations" to not act in certain ways, and they are *supposed* to govern the actions of *all* individuals. Positive

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<sup>12</sup> There is an interesting and important relationship between negative rules of conduct and necessary conditions which is based on this difference, and it flows from a similar distinction existing between necessary and sufficient conditions. If one is discussing the necessary and sufficient conditions for an event to occur, one should be aware that *all* of the necessary conditions for that event must *always* be present for the event to possibly occur. The same does not hold true of sufficient conditions if there are *alternative* sets of sufficient conditions, each of which is by itself sufficient for an event to occur. If this is the case (and it does seem to be an integral part of the notion of what it is to be a sufficient condition that there do exist alternative sufficiency conditions — for otherwise, would not such conditions be necessary ones?), then it can be stated that not *all* of these sets must be *continually* satisfied for the event to take place. That is, although it can be argued that *some* particular set of sufficient conditions must be satisfied if the event is to occur, it is not the case that *all* such sets are required. This difference in the scope of necessary and sufficient conditions — with necessary conditions embedding the idea of a *lack* of alternatives, and with sufficient ones based on the idea of a multiplicity of alternatives — is connected to their difference in their degrees of abstraction, in that necessary conditions apply across wider domains of space-time than do particular sufficient conditions. This constitutes an important difference between the two types of conditions, and provides an important link between necessary conditions and negative rules of conduct.

<sup>13</sup> As it is the task of chapter five to elaborate on the differences between negative and positive rules of conduct, I will not go into the arguments supporting these claims at this point.

<sup>14</sup> See Hayek (1976, 101-106).

rights, on the other hand, establish certain actions which can be relied upon to occur and to whose satisfaction one has a right. What this means is that there is an obligation upon some individual to act in a certain way for another individual. It is this interdependency which constitutes the additional informational complexity of positive rules. The essential idea is that there must be additional rules which govern these interdependent relationships. These rules would have to govern when such acts would be required, who would receive priority when claiming the acts of another, and how conflicts between priorities would be resolved. Put another way, because a negative rule does not demand conduct, it does not lead to conflicts between the actions generated by the rule. The same is not true of rules prescribing performance. The same positive (performance requiring) rule imposed on two individuals could generate actions which are in conflict. Positive (performance requiring) rules presuppose the existence of a mechanism which can resolve these conflicts.

The discussion above is related to Hayek's notion of freedom as "freedom from the coercion of another individual" (Hayek 1960, 11-21), Hayek defines freedom in a negative way, i.e. that one is free if one is not being coerced by another.<sup>15</sup> Hayek is opposed to defining freedom as the ability or inability to do certain things because such a definition does not emphasize the difference between not being able to do something because someone intentionally stopped you and not being able to do something because of some other form of impediment. To be able to identify the former, one need only identify such intentional blockages under some definition of what is (and ought to be, within some normative sphere) disallowed as the intentional and unjustified manipulation of another.<sup>16</sup> To be able to identify the inability to act for more general impediments, one needs to know not only whether someone contravened a code of conduct but rather more detailed knowledge about the reasons for the lack of ability to act. This raises interesting but complex questions of (a) could an impediment be changed by human action (b) should it be changed by human action and (c) by which method (if there is more than one) should it be changed (implying the question "and upon whom should the responsibility fall to change it")? It would seem that Hayek's notion of freedom as freedom from coercion, being limited to contraventions of

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<sup>15</sup> This discussion is extended and supplemented by a similar examination in chapter six.

<sup>16</sup> Implying, of course, a notion of responsibility and consequent closure over the causal distance between certain acts and their effects. The question is, then, whether there was a normatively unjustifiable act which produced normatively unjustifiable effects which one ought to have expected (implying that one was "close enough" to the effects *in normative terms* to be held responsible for them). Note that the question is *not* whether one *could* have expected the results, but rather one of whether one *ought* to have expected the results. Thus, the issue is not merely one of foreseeability, but rather one of *normative* foreseeability.



essentially negative rules of conduct, rules which do not prescribe conduct to be performed but rather prohibit certain forms of activity (or at least do not prescribe that acts be performed), is related to issues of informational and performative complexity. A regime of prescriptive rules generates additional complexity and hence will be more difficult to implement. This does not imply, of course, that the additional informational complexity might not be worth the effort, or that there might be some positive rules that should be put into effect. All that is being pointed out is that the implementation of such rules will call for additional mechanisms. This in itself is not the major difficulty. Rather, it is the consequent social and power structure which is required to implement a regime of prescriptive rules which is the focus of Hayek's objections. Hayek emphasizes the difficulties which arise from the manner in which information enters into judgments, the costs — and not merely the *financial* costs — of gathering this information, whether this additional information can be objective or not, and the social and power structure which such a prescriptive system of rules presupposes.

None of the above rules out arguments which claim that some positive necessary conditions for action and for social life *can* and *should* be fulfilled. It would be a mistake to ignore such arguments, and it is a trap that Hayek is sometimes accused of falling into. My view is that Hayek's emphasis is not on this point but, to be fair, he does not totally ignore it. One can argue that Hayek's list of some positive necessary conditions for individual action, and the governmental role in providing a framework for these action, is greater than one would obtain from, say, a strict libertarian reading (consider Nozick (1974), for example).<sup>17</sup> But the main point is this: Hayek's focus of attention is not so much with what is included in the set of necessary conditions as with the *methods* of fulfilling any necessary conditions. Hayek's interest, in the final analysis, lies less in the content of the pre-conditions for social life, and more in *how* they are generated and supported. This leads, then, to his persistent focus on the properties of the conduct governance mechanisms which underlie and support these pre-conditions.

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<sup>17</sup> For example, in *The Constitution of Liberty* (1960), Hayek advocates — in addition to a governmental monopoly on coercion and the provision of a legal system (pp. 142-144) — care for the disabled and infirmed (p. 144), the provision of a minimum income and mandatory health insurance (pp. 285-286), most sanitary and health services (p. 213), mandatory minimum standards of education (pp. 377-384). Hayek goes further than this and advocates the provision of roads and information (p. 144), a stable monetary system, a system of weights and measurement, surveying and land registration systems (p. 223), many of the amenities provided by municipalities (p. 213), including parks, museums, theatres, and facilities for sports (p. 259), public housing and town planning (p. 346), and the regulation of health and safety (p. 225), techniques of production (p. 224), construction (p. 225), qualifications (p. 227), agriculture (p.364-366) and the environment (p. 369).



## 10. Conclusion

This chapter has introduced Adam Smith's impartial spectator perspective and the process which generates this, the mutual sympathy mechanism. The discussion focused on how this process generates rules and what the properties of rules generated in this way might be. Smith's mechanism generates rules with two important properties: they have the potential to be relatively objective, and they are predominantly negative. The first property — objectivity — flows from the ability of the mutual sympathy mechanism to generate rules which, to a degree, overlap between individuals. It is this overlap between rules which underlies the similarity of judgments which are governed by these rules, and this similarity of judgment — the relative independence of judgments and person-specific particulars — is the basis of objective judgment within this thesis.

The discussion in the following chapter examines an implicit presupposition of the discussion of objectivity of this chapter. It has so far been presupposed that there exist processes of reasoning which underlie objective judgments. The next chapter turns to an examination of the general aspects of these processes. The generation of objectivity, then, and its relationship to different forms of reasoning and the restrictions on these processes, will be the next subject of discussion.

Following this, the thesis turns to an examination of the second property of rules generated under a mutual sympathy mechanisms. This is their negativity, in the sense that they are prohibitive. The latter sections of the present chapter focused on the informational and performative requirements of prescriptive and prohibitory rules. It was argued that in many cases negative rules which manifest prohibitions are informationally and performatively less complex to obey than are positive, prescriptive, rules. Finally, this chapter tried to relate negative — in the sense of undesirable — outcomes to negative — in the sense of prohibitory — rules. All of this presupposed, of course, that the distinction between negative and positive rules was an intelligible one and that it *could* be made. Chapter five focuses on the identification of negative rules and examines the view that any negative rule can always be put into the form of a positive rule. It examines in detail some objections to the negative rule distinction, and spells out the implications for authority structures which are based to a large degree on one type of rule or the other. Once this is completed, and based upon the insights of these and previous chapters, the thesis turns to an examination of the general principles underlying Hayek's notion of law and the idea of the

Rule of Law, the feasibility of distributive justice in an abstract society, and the theory of mind and abstraction which underlies much of this thesis.

## **Rule-Generating Mechanisms, Part II**

### **Particularity filters and the processes of reasoning**

#### **1. Introduction**

The discussion of the impartial spectator in the previous chapter presented a general process capable of generating abstract rules. In particular, it was argued that the striving to achieve an impartial spectator perspective could lead to the generation of objective rules of judgment and conduct via the mutual sympathy mechanism. The focus of that chapter, then, was on a method whereby abstract rules of conduct were generated, with the important proviso that only certain types of rules could be generated and supported by virtue of the restrictions implicit in the very method which was under discussion. This chapter will build on the discussion of the previous chapter by considering models of reasoning and judgment as methods of generating rules, with a focus in particular on deductive and non-deductive methods. It will also examine restrictions — filters — one might place upon the growth of rules under these methods. The argument of the chapter will be that the application of reasoning and its filters, in combination with the striving towards an impartial spectator perspective, can lead to the generation of objective rules by providing criteria by which a rule (or a judgment) can be judged acceptable or unacceptable. These selection criteria include the universalizability, consistency, coherency and consequences of the rule under consideration. As we will see, there is some overlap between them. Nevertheless, each emphasizes a particular aspect of an acceptable decision and hence it may be useful to discuss them separately.

The plan of this chapter is as follows. To be able to point to the differences and similarities between deductive and non-deductive processes, a general framework for reasoning will be introduced. Once the general aspects of this model of reasoning have been examined, I proceed to a more detailed analysis of each method of reasoning. Restrictions on reasoning and their interaction with the more general restriction which is manifested in

the striving to achieve an impartial spectator perspective are then introduced. Finally, a debate between MacCormick and Jackson is considered, with the goal being to consider the application of rules and the nature of their universality.

It should be kept in mind that this chapter focuses on the differences between deductive and non-deductive processes of reasoning, and does not directly examine the differences between deductive and inductive reasoning, although the latter process will be examined in some detail in the final chapter of this work.<sup>1</sup> Why, then, focus on such a dichotomy and not upon a deductive/inductive split? The reasons for this are numerous, but probably the most important is that the chapter is primarily interested in focusing on the boundaries of deduction, the situations in which it becomes more difficult to apply, and the reasons for these difficulties. The chapter focuses on these boundaries, and the term I have chosen to use to mark out the other side of these boundaries is the term “non-deductive” reasoning. The essential difference between deductive and non-deductive reasoning is, in this chapter, the explicit exclusion of *weights* or *intensities* in the former, and their explicit inclusion in the latter. Though there are doubtless many other ways of distinguishing deductive reasoning from other forms of reasoning, this dichotomization is chosen because it is important to make clear the relationship between intensity and closure and because the relationship of closure to reasoning is the subject of some discussion in later chapters.

While the consideration above explains why the focus of this chapter is on deductive versus non-deductive reasoning, it only explains in part why it seems that inductive reasoning is not discussed in this chapter. The reasons for this are threefold. First, the

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<sup>1</sup> It might be noted that this chapter dichotomizes reasoning in a similar way to many works in artificial intelligence and cognitive science. See, for example, the discussion in Stillings *et al.* (1995, 116-135) and Russell and Norvig (1995, 92-520). This chapter does, however, take a slightly different view from these works, in that it emphasizes the difference in the treatment of closure provided by each perspective. Seen in this light, there are a couple of points worth mentioning. First, this emphasis on differences in closure is in some ways analogous to a distinction made in the theory of logic between bivalent and multivalent logics. In specific, the distinction between logic based on “crisp” sets and those based on “fuzzy” sets is similar to the distinction made in this chapter between all-or-nothing and matter-of-degree closures. For an introduction to crisp set theory and logic, see Suppes (1960) and Suppes (1957), while for an introduction to fuzzy set theory and logic, see Zimmermann (1985) and Lin and George (1996).

A second point worth mentioning concerns the effects of basing one’s reasoning predominantly on one view of closures or the other. That is, it can be argued that different notions of closure tend to be associated with different general notions of reasoning, and in particular with different conceptions of what reasoning *does*. It is interesting to note that these different conceptions of reasoning have a contemporaneous manifestation in the different approaches taken by two alternative (or perhaps complementary) approaches to artificial intelligence and cognitive science: the symbolic (classical) paradigm and the connectionist alternative. For a introduction to the symbolic perspective in cognitive psychology, see Anderson (1995). For more on the operationalization of reasoning within AI, and for an excellent introduction to its symbolic paradigm, see Russell and Norvig (1995), while for an overview of a connectionist view, see Lin and George (1996). Finally, for a comparison of these two approaches, see Stillings *et al.* (1995, 15-83).

previous chapter has already discussed induction under the guise of the mutual sympathy mechanism and the impartial spectator perspective. General rules being generated by particular examples is one definition of induction, and that was what was being described by Adam Smith's model. Secondly, and perhaps more importantly, the growth and generation of abstract rules from concrete particulars will be discussed at some length in the final chapter of this thesis. The discussion of the previous chapter was in a sense preliminary to this and, of necessity, rather more general. To undertake a more complete discussion of induction, one requires a more precise set of conceptual tools. These will be introduced in the final chapter. Thirdly, and finally, this chapter *does* discuss the generation of abstract rules from the consideration of concrete circumstances. Much of this chapter develops insights into selection filters on reasoning, and it is precisely these filters which, starting from a particular judgment over a particular situation, generate rules of greater and greater abstraction. That I have not, throughout this chapter, described such a process as induction, does not take away from the fact that that is precisely what it is.

## 2. A general model of reasoning

Having surveyed the general outlines of the chapter, it is now time to turn to an examination of deductive and non-deductive processes of reasoning. Such a discussion has the potential to be quite confusing, given that different models of reasoning can be described in a variety of alternative ways. At least part of the difficulty lies in the terminology which is adopted. How, then, might this problem be addressed so that a comparison between reasoning processes can be undertaken with a minimum of terminological difficulty?

The strategy adopted in this chapter for addressing the issue is to provide a general framework which encompasses various alternative processes of reasoning. This framework must be general enough to capture the important differences between processes, but not so general that the distinction between them is lost. I believe that the framework outlined here (and developed at some length in the final chapter on the theory of mind) is up to the task. The framework that this chapter will work within is termed the *classification model of mind* or, equivalently, *mind-as-classifications*.<sup>2</sup> Under this model, mind is composed in its totality

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<sup>2</sup> As this model will be discussed at greater length later on in the work, this section provides only a minimal introduction to some of its more important features. This characterization of mind is in many respects a refinement of Hayek's theory, as presented in some detail in *The Sensory Order* (1952), although it should be



of a variety of classifications of differing intensities. But what, then, are “classifications”? And why, one might ask, are they of differing “intensities”? Consider the definition of “classifications”. The notion of “classification(s)” which underlies this chapter is in some ways quite similar to its common usage. When one sets out to classify phenomena using a variety of classifications, one is only able to classify that which falls within (or under) these pre-existing classifications. In common usage, then, individuals *use* classifications to classify what they *already* know.

Under the theory of mind underlying this chapter, things are a bit different. In a model of mind-as-classifications, not classifying a phenomenon is *identical* to not knowing it. In other words, knowing is viewed *as* classifying.<sup>3</sup> It is important to be clear on this point, for if one does not keep it in mind confusion is sure to follow. The difference between the usage of this chapter and one’s commonsense notion of classifications (and classifying) is that our commonsense notion presupposes that there is something in our minds which does the classifying. That is, “one” merely *uses* classifications to classify phenomena which “one” *already* knows by other means. Under the framework of this chapter, the act of classifying is identical to the act of knowing.<sup>4</sup> Classifying, then, is *how* one knows what one knows and, under the theory of mind-as-classifications, classifying is the *only* way that knowing occurs.

Hence, one way that the commonsense notion of classifications differs from the one of this chapter is in the distinction between classifying and knowing phenomena. When one uses a classification (but knows by *other* means), one can resort to a classification system which includes a category that classifies phenomena “not applicable under any other classification”. Using such a system of classification, one might come to think that *any* phenomenon would be classifiable. This is not exactly correct. What is correct is that this classification system can classify anything which is *known*. If something is not known, it cannot be classified. The classification model of mind, on the other hand, eliminates the distinction between knowing something and classifying it. Knowing is considered to be

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pointed out that the theory outlined here puts a much greater emphasis on the intensity aspects of mind than did Hayek’s characterization.

<sup>3</sup> This way of conceiving of knowing is similar to Hayek’s discussion of the process of classifying, as elaborated in *The Sensory Order* (1952, 48-52). It is important to keep in mind that this way of viewing the process of knowing is, for the purposes of this chapter and the remainder of the work, all-inclusive. Thus, the various forms of knowing — sensory, perceptive, and cognitive — *all* fall under this general framework. It might also be noted that on this view knowing is not necessarily conscious, nor is there a necessary connection between knowing and consciousness.

<sup>4</sup> Thus, the term “classifications” can have quite a different meaning from ordinary usage. The terms “classifying” and “classifications” should, then, be viewed as stipulative terms which in later chapters will not necessarily conform to ordinary everyday usage.

equivalent to classifying, and vice versa. Classifying, then, is a necessary and sufficient condition of knowing.<sup>5</sup>

The other unfamiliar aspect of this model is the association between classifications and “intensities”. In this model, all classifications have an associated intensity, and these intensities can be different. This implies that some classifications are stronger than others. “Strength”, in the sense used in this chapter (and in the thesis more widely), implies that when there is a *conflict* between classifications, the stronger classification excludes the weaker.<sup>6</sup> One example<sup>7</sup> of a conflict between classifications would be a conflict between beliefs. Within this model, an individual’s mind can contain conflicting beliefs. “Conflict” in this context means that it is impossible to realize these beliefs simultaneously within the framework of the individual’s mind. One belief — one classification — excludes the realization of the other.<sup>8</sup> Intensities, then, delimit the scope of applicability of classifications.

These two aspects — classifications and their intensities — constitute the essential elements of the theory of mind resorted to in this chapter. One aspect, however, remains to be discussed — the value of such a general theory of mind to a discussion of the processes of reasoning. There are three aspects which should be considered, and two others which

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<sup>5</sup> It is not, however, sufficient for having or generating true (or “correct”) beliefs. It should be obvious, but might be worth stressing, that this conception of knowing is *not* equivalent to “having knowledge” (in the standard philosophical usage of the latter phrase, i.e. knowledge as true, justified beliefs), but rather is closer to the idea of “having in mind”. The importance of this difference comes from the fact that whilst knowledge is necessarily associated with truth-claims, forms of knowing are not. That is, while it makes sense to claim that certain beliefs are true and therefore are knowledge, it does not make sense to claim that certain ways of knowing are true (or false). Rather, such ways of knowing are simply better or worse at performing certain activities, such as generating knowledge (truthful beliefs). To give an example: whilst it does make sense to say that my belief that it is raining outside is one which can be found to be true or false, it does not make sense to say that the mechanisms which generated or supported this belief are true or false, or that the various ways that I might have of knowing that it is (or is not) raining outside are themselves true or false. In each case, these mechanisms are simply better or worse ways of generating true beliefs or of knowing what the truth is. Thus, even though the way in which one arrives at one’s beliefs is in many cases related to the truth or falsity of these beliefs, it cannot be said that these methods are themselves true or false, but merely that they are better or worse at generating or sustaining truthful beliefs.

<sup>6</sup> The *source* of the strength of classifications will be discussed in the final chapter which examines the theory of mind underlying this work.

<sup>7</sup> Though not, of course, the only one.

<sup>8</sup> There is another aspect of closure which is of some interest. Consider the *interpretation* of phenomena. When individuals interpret a phenomenon, they give the phenomenon meaning *within* the framework of their own classifications. This implies that classifications which do not exist within the mind of the interpreter cannot be part of an interpretation. “I don’t share your beliefs (goals, values), and hence I have come to different conclusions” would mean, within the framework of this chapter, that “because our classifications are different, I classify things differently from you”. What this implies is that the very pre-existence of classifications means that some aspects which cannot be classified by these classifications cannot be included in — and must be excluded from — any interpretation. In this sense, then, exclusion and closure are built into the very foundations of this model of mind.

should be mentioned. In my view, the primary benefit of the model is its theoretical clarity. The unity of the framework implies that all processes of mind are encompassed by this model. Furthermore, all manner of terms which enter into discussion of reasoning — premises, rules of inference, conclusions, goals, values, implicit presuppositions, etc. — are addressed within a single framework. What is lost in differentiation is made up for in clarity of thought, for the question of interest becomes “what are the properties of the different classifications in a reasoned argument?” rather than “but what does ‘premise’ mean? Is it articulated? Conscious? Merely presupposed? etc.”. Using the classification model of mind, then, allows one to focus on the similarities and differences between theories of reasoning in a clear and explicit manner and under a common framework of analysis.

Another reason for resorting to this model is that many models of reasoning implicitly presuppose the existence of other types of knowledge which impact on the processes of reasoning but which do not enter the model in an explicit manner. By referring to *all* forms of knowing as classifying, this difficulty is explicitly addressed.

A third reason for using this model would be its relatively clear connection to the notions of subjectivity and objectivity used in this thesis. Relatively objective classification is classifying that takes place in a relatively similar way across minds,<sup>9</sup> while relatively subjective classification is classifying that takes place in a relatively different manner across minds. Similarly, relatively objective judgment is that which is similar across minds faced with the same environment, with the degree of similarity constituting the degree of objectivity.

There are a couple of other reasons for resorting to this model. First, there is an intimate connection between it and the process of abstraction. As will be apparent from this, and previous, chapters, abstraction is a process of fundamental importance. The chapters which follow emphasize this repeatedly. There is, as we shall see, an intimate connection between the mind-as-classifications model and the process of abstraction. This connection is related

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<sup>9</sup> Relative to a third classification system, of course. It might be pointed out that knowing something objectively does *not* imply that this knowledge is independent of all classification-systems, nor that this knowledge is independent of its environment and context, nor that all knowing which depends upon a classification-system is necessarily subjective. Thus, the question “but is it *really* like that?” would be meaningful only if one were implicitly comparing the classifications of the particular phenomenon in its particular context under one classification-system with those of another (which is taken to be the standard of comparison). Consider, for example, the question of whether a particular apple is “really” red. This question could only be answered by referring to the interaction between that which is classified and the classification over it in a particular environment. It should be obvious that there may be different answers to this question, depending upon the classifications which are taken as “canonical”, and the environment within which the acts of classification take place.

to a second reason for using a classification model of mind, this being that such a model will be shown, in the final chapter, to be the model of mind which underlies this entire work. Thus, the mind-as-classifications model provides the general framework for all of the various concepts introduced up to this point, and for all those that shall follow. The reason, then, for introducing this model of mind is that it makes explicit what is sometimes merely implicit.

### **3. The similarities between processes of reasoning**

Having said all of this, it is perhaps time to turn to the two processes of reasoning which will be examined in this chapter: deductive and non-deductive. Fundamental to any process of reasoning is the existence of classifications under which phenomena are classified. Deductive reasoning typically uses articulated classifications, non-deductive reasoning relies on unarticulated classifications to a greater degree.<sup>10</sup> The question of interest at the moment is what these processes share in common. As mentioned previously, these processes depend upon classifications under which different events, actions, etc., are classified into a variety of classes. The assumption of the existence of classifications is therefore one point of similarity. Now, probably the most important point of similarity is that both of these processes rely upon classifications which exist outside the reasoning process itself and which are used by that reasoning process. These classifications typically remain unquestioned during an argument. If one wished to examine them within the framework of reasoning one would have to resort to still other classifications which could not themselves be questioned by the individual conducting the investigation. There is, then, a limit on the scope of an investigation which any single mind can undertake, and it is these classifications which form the limits beyond which an investigation cannot proceed.<sup>11</sup> Finally, these processes share a dependence on classifications which are both articulated and

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<sup>10</sup> For completeness, it should be mentioned that inductive reasoning is concerned with processes which generate classifications.

<sup>11</sup> This Gödel-like restriction applies in a static sense across all reasoning which takes place within a mind — a point noted by Hayek (1967, 61-62), but applies only in a much more general way when one is considering the dynamics of reasoning, and in particular when one is considering its inter-personal dynamic.



unarticulated, conscious and unconscious. The degree to which they depend upon each is of course different, but both do depend upon on classifications of these types.<sup>12</sup>

A process of reasoning, then, is constituted by a variety of processes of classifying. Each type of reasoning is constituted by these classification processes. In other words, the complete classifying action-set under which actions, events, etc., are classified are constitutive of each type of reasoning.<sup>13</sup> The “implications” of these classifications are always derived *within* the framework of reasoning that these processes generate. Thus, the *form* of these processes is intimately related to the *content* which emerges.

#### 4. Deductive reasoning

Consider the case of deductive reasoning, as expounded, say, in Neil MacCormick’s *Legal Reasoning and Legal Theory* (1978). Such reasoning usually recognizes as “valid” *within* a deductive argument only articulated classifications. These articulated classifications are typically known as *premises*, and are taken to be unquestioned *within* the deductive framework. These articulated classifications are then applied to particular actions which “fall within” the framework they establish. After a resort to rules of inference, *conclusions* follow; that is, implicit or explicit within the premises are results which are considered unquestionable and “follow” from “application” of the premises and the rules of inference to particular cases.

#### 5. Criticisms of deductive reasoning

Criticisms of deductive reasoning typically focus on the lack of unarticulated classifications explicitly within its structure. *All* deductive argument uses both articulated and unarticulated classifications to provide a foundation for other classifications which act as the explicit, articulated premises of the argument. It is impossible *in principle* to construct a completely deductive argument — this being an argument where all of the unquestioned classifications are articulated — for there will always exist classifications

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<sup>12</sup> One could, of course, point out other properties of classification which the processes of reasoning share in common — these are not the only properties of classifications which are important — but they are the ones which will be stressed in this discussion.

<sup>13</sup> None of this is to say that processes of reasoning are independent of the environment in which they operate, however, for the classifications of mind are intimately and inseparably connected to their environment, a point which shall be discussed in the final chapter of this thesis.



which underlie articulation and which are themselves unarticulated *within* the framework established by these classifications.<sup>14</sup> This means that a deductive argument necessarily rests upon a foundation of classifications which cannot, in principle, be justified deductively. If a deductive justification is required for a classification to be considered as deductively justified, then this is in principle impossible, for all deductive reasoning resorts to both articulated and unarticulated classifications, some of which cannot be deductively justified.

## 6. Deduction within a more general framework

It should be emphasized that the conclusions of a deductive argument are *always* embedded in the unquestioned classifications structuring the argument. That is, the conclusions *necessarily* follow from the structure of classifications which generate a deductive argument, including both the articulated and non-articulated classifications. The soundness of a deductive argument, of course, will depend upon the conflicts between the classifications of the reasoning process and the more general set of actions within which it is embedded. Now, one could say the soundness of a deductive argument depends on (i) the truth of the premises, (ii) the validity of the principles of inference and (iii) their correct application *if* we considered a deductive argument to be relatively “self-contained”. If, on the other hand, one took a more abstract view one could note that the decision about the “truth” of the premises and the “validity” of the principles of inference and their application implies these fall under a more general framework under which these terms achieve their meaning. Now, whether or not a premise is “true” or whether the principles of inference are correctly applied depends on their interaction with the other actions with which they are connected.<sup>15</sup> If there is a “substantial” conflict between the classifications which construct a deductive rational structure a premise can be “poorly defined”, a principle of inference can be “unsound” and their application can be utterly incorrect. What is decisive is the conflict between the classifications which generate the deductive framework. Typically, of course, these conflicts are not considered to be substantial and hence this model of reasoning is relative uncontroversial. For this to be the case, the *closure* which separates the internal<sup>16</sup>

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<sup>14</sup> The questioning connections could be articulated by other connections of articulation or by other minds. Both, then, would contain differing perspectives, depending on which connections were doing the questioning.

<sup>15</sup> Note that this presupposes a premise is “well-defined”.

<sup>16</sup> Internal in a negative sense: by being external to the connections which do the questioning.

aspects of the argument (premises, principles of deduction and their application) must not embed “significant” conflicts.<sup>17</sup> If they do, the “barrier” between the internal aspects and those external to it disappears. A deductive argument, then, will begin to “unravel”; that is, more and more previously external classifications will become part of the internal framework. Given the non-articulable nature of many of the classifications of mind, this implies that it will often be the case that a “strictly” deductive argument — articulated premises, principles of deduction and application — will become, in part, non-articulated and, hence, non-deductive (sometimes termed “intuitive”). This, of course, reveals the fact that both types of reasoning are instances — special cases — of a more general form of reasoning. A deductive argument, then, eliminates conflicts by excluding them from the internal boundaries of the framework (i.e. conflicts cannot be an element of a deductive argument). If deductive arguments attempt to contain conflicting elements, they will unravel and become another form of reasoning: non-deductive reasoning.<sup>18</sup>

## 7. Non-deductive reasoning: utilitarian and principled

Non-deductive reasoning recognizes the necessity of the existence of unarticulated classifications for reasoning. It typically involves using some articulated and unarticulated classifications to define the “essential” elements of a particular case. It does not attempt to articulate all of the premises which define the framework within which arguments take place. Reasoning of this form comes in a variety of guises, but we shall mention only two in particular. Consider, for example, utilitarian reasoning. In its various manifestations it attempts to evaluate the results (consequences)<sup>19</sup> of particular arguments. Utilitarian reasoning typically takes as unquestioned the rank-order valuations of the results (consequences) under consideration.<sup>20</sup> A second type of reasoning, principled reasoning, takes a set of principles and a rank-ordering of these principles (not necessarily articulated)

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<sup>17</sup> Thus, a reasoned argument (and in particular a deductive argument) is predominantly based upon *quantity*, *all-or-nothing closures* with their strong overriding capability. Strong overriding, then, is the basis of the elimination of conflict and incompatibility.

<sup>18</sup> This issue will be discussed further in chapter nine.

<sup>19</sup> I am familiar with a distinction sometimes made between “results” and “consequences”, the latter being a more inclusive (i.e. abstract) set than the more restricted (i.e. concrete) one of “results”, but I will not be using it in this thesis.

<sup>20</sup> For a classic, if rather mathematically formal, development of the concept, and implications, of rank-ordering within a utility framework, see Debreu (1959). For some of its uses when combined with the typical assumptions of neo-classical economic theory, see Varian (1982).

as unquestioned. This type of reasoning usually disdains the attempt to consider the consequences of the conclusions of its reasoning, in contrast (and frequently in opposition) to utilitarian forms of reasoning.

## 8. Criticisms of non-deductive reasoning

There are at least two obvious difficulties with non-deductive reasoning. It should be noted that these problems are present to some degree in deductive reasoning as well; that is to say they are not unique to non-deductive reasoning. First, this form of reasoning sometimes attempts to escape the bounds implicit in the structure of reason by questioning the classifications which define the structure *within* which all argument must take place. That is, this form of reasoning frequently attempts to question the classifications which *define* the framework of the questions — an act which (at least implicitly) conflicts with the very structure of reasoning which requires that, at least provisionally, unquestioned classifications remain unquestioned. Second, non-deductive reasoning, depending as it does on unarticulated classifications, tends to be more difficult to defend on “rational” grounds. This last criticism does have some force, and it does seem to be the case that non-deductive reasoning does tend to be less amenable to conscious examination. The fact, however, that one “feels” one’s way along in a non-deductive argument says nothing about whether or not they are *correct* arguments, nor does the fact that an argument is difficult to articulate imply that it is incorrect. The difficulty or ease of articulation is not determinative of the correctness of an argument.

## 9. Differences between deductive and non-deductive reasoning

The two types of reasoning focus on different aspects of arguments and have different concerns. In the main, deductive reasoning focuses on articulated arguments, with non-deductive reasoning concerned to a greater extent with their unarticulated aspects. As well, deduction is based predominantly on strong closures (all-or-nothing), while non-deductive arguments are based to a larger extent on quality, matter-of-degree, closures. Deductive reasoning differs in other ways as well. Deduction is reasoning in which the conflicts remain external to the argument. Thus, conflict (if it exists) has been resolved or at least ordered before a deductive argument can be constructed. Non-deductive reasoning, on the other

hand, explicitly examines conflicts between classifications. Now, an interesting point is that a deductive argument may be seen as one possible *outcome* of a conflict between classifications. In other words, a deductive argument traces out the *results* of various conflicts which have *already* been resolved *external* to the deductive sphere. This is why a deductive argument contains no *internal* conflicts — how could it, when it conditions upon the *results* of the resolution of various conflicts outside the deductive sphere? Thus, critics of deductive reasoning who claim that it eliminates all difficult decisions miss the point that that is precisely what deductive argument does, i.e. it provides a statement which, by inference, is conditional upon the results of resolved conflicts which lie outside its sphere.

#### 10. Justification and restrictions on reasoning

An implicit presupposition underlying the methods of deductive and non-deductive reasoning is that justifications of judgments are important. Both methods are amenable, in varying degrees,<sup>21</sup> to the imposition of a variety of criteria which can be used to separate acceptable from unacceptable judgments. Consider some of the restrictions placed upon reasoning in MacCormick's discussion of legal reasoning in *Legal Reasoning and Legal Theory* (1978). MacCormick outlines various filters through which particular manifestations of reasoning — in this case, legal arguments — must pass if they are to remain "good" arguments. The first of these is the test of *universalizability*. This is the requirement that one must be willing to apply the rule which governs a judgment in all situations which are "similar". Second, there is a test of *consistency*, which requires that the rule does not conflict with any other rules which are considered "valid". Thirdly, there is a test of *coherence*, meaning the rule must fall under a more general rule which is considered valid. Fourth, there is a test of the *general consequences* of implementing the rule (as opposed to the concrete results in the particular case).<sup>22</sup> If a rule manages to pass through all of these filters,<sup>23</sup> it is considered a "good" rule for resolving the case at hand.<sup>24</sup>

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<sup>21</sup> It can be argued that non-deductive arguments are more holistic and hence less amenable to the separating out of individual rules of judgment. Non-deductive reasoning tends to use combinations of rules and relies to a lesser extent on individual rules. Deductive reasoning tends to be more amenable to separable rules. The reason for this lies with the nature of the closures which underlie each type of process. All-or-nothing closures are more amenable to separable rules; matter-of-degree closures make such separations more difficult.

<sup>22</sup> I will consider this filter in a different light in a later chapter. It will return as a part of what I refer to as the minimum coercion filter.

<sup>23</sup> This is not to imply that all of these filters will be used in any particular case. It merely implies that *if* they were applied, they would not filter out the rule under consideration.



### 11. The impartial spectator and its relation to other filters on reasoning

The discussion to this point has assumed that the goal of justifying judgments is a desired one. If this is indeed the case, the question arises as to *whom* the judgment is considered justified. This is a question of perspective. Different forms of justification, be they based on universalizability, consistency, coherence, or consequences, will be considered valid *by other individuals* only if the individual making the judgment strives to achieve a perspective which is shared to a large extent by these other individuals. It is this striving which connects the methods of justification discussed in this chapter with the mutual sympathy mechanism and its resultant construct, the impartial spectator. The *striving towards* an impartial spectator perspective is an additional restriction to that of universalizability, consistency and coherence. To see why, consider the following. The restriction of universalizability implies that an acceptable rule will be one which an individual is willing to apply in all similar cases. How does this relate to the rules generated by the mutual sympathy mechanism and its resultant construct, the impartial spectator? An individual engaged in the mutual sympathy process tries to construct the perspective of an imaginary observer, and tries to incorporate into their rules of judgments only those aspects which could be known to this spectator. In other words, the individual selects those aspects which could be known in common by themselves and an imaginary spectator who is observing their situation. It is the *choice* of aspects which are held in common which relates the impartial spectator to universalization, for not only must the individual be willing to apply in every similar case the categories of the rule they have under consideration, but they must also search for categories (classifications) which an impartial observer would be willing to apply.<sup>24</sup> Though the judging individual might have person-specific knowledge or information which could augment the rule which governs a judgment, it should not be incorporated into the rules of the final judgment unless that knowledge could be known from the impartial spectator's perspective. Thus, the aspects which the individual is willing to apply in all future cases, as mediated through the impartial spectator, are those which could be known by that observer. To put it another way, one might ask how the impartial

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<sup>24</sup> MacCormick also deals with the process of forming new rules when he considers arguments of analogy. Analogy is the growth of new rules by identifying aspects which are common across situations. The filters mentioned above are tests which apply to pre-existing rules; analogy is one process whereby new rules are generated. This is, as one shall see, closely related to the discussion of the restrictions placed upon the growth of new rules of judgment.

<sup>25</sup> And, obviously, which could be *known* by that observer.



spectator perspective is related to the universalizable condition that one is “willing” to apply the rule in all similar cases? The answer to this is that while universalization hinges on the issue of whether *an individual having certain values* is willing to apply these aspects in all future cases, the impartial spectator widens the scope of this and asks what an impartial observer would be willing to apply in all similar cases. The impartial spectator restriction thus considers rules which would be acceptable to, and can be used by, impartial external observers, while universalization is concerned with what an individual is willing to accept as an acceptable rule, given their own partial standpoint.

The same argument applies to the consistency, coherence, and acceptable consequences requirements. These restrictions apply to the workings of an individual’s judgment, given their knowledge, information, and value ordering. The impartial spectator requirement adds to this by imposing the condition that one should strive to achieve a perspective that could be achieved by an imaginary spectator observing one’s situation and circumstances. Thus, when combined with the striving for an impartial spectator position, consistency, coherence and acceptable consequences are not merely requirements within an individual mind (i.e. “the rule you chose should be one which is consistent, coherent, and produces acceptable consequences within the system of other rules *you* obey”), but rather are requirements which apply to observers who do not share the complete set of knowledge and information which is available to the actual individual who is required to make a judgment (i.e. “the rule you chose should be consistent, coherent, and have acceptable consequences from the perspective of an impartial spectator who can only know select aspects of what you know”).

## 12. Universalization

To flesh out the discussion above, consider universalization as a method of justification. Under this method a classification must apply universally to be valid; that is, it must apply to all cases of the same (or similar) type. Now, a question of some interest is the meaning of the terms “all”, “universal”, “same” and “similar”. It is obvious that we cannot verify that a logical classification applies to future cases, for they have not yet occurred. It seems that the universal application of a classification is conditional upon a particular time and space; that is, it refers to a restricted time and place — and that this is necessarily the case. For example, a universal classification of human action is typically restricted to wherever humans are — and more. If it is to be universalized it must refer to combinations of actions

which are known by a mind; otherwise, a mind would find it impossible to universalize the classification. Universalization is, then, conditional upon the structure and knowledge of the universalizing mind, and upon those environments within which classification can take place. The set over which the classification is universalized is, in fact, the set of actions known to that mind. A universalized classification, then, is necessarily conditional upon the knowledge and structure of the universalizing mind. This does not imply, however, that universalization could not be commonly shared across minds, and in this sense universalization does not necessarily depend upon the idiosyncratic details of a particular mind.

Now, if the universalization of a classification is conditional upon a particular time and space (for it typically does not extend into the infinite future or back into the infinite past) is it in some other sense conditional as well? The answer is yes. As in the discussion above, universalization is conditional upon the structure of the mind doing the universalizing. As an example, consider the classification "one should not lie to one's spouse". This classification contains particular detail *relative* to other more abstract classifications. For example, one could say "one should not lie to anyone" or "one should not act, intentionally or non-intentionally, such that a truth-conflict results". What, then, determines the level of abstraction of the classification which is used? One could answer "the process of universalization determines the level of abstraction: if too detailed or too abstract, it will not be applicable to 'enough' cases." But what, then, does "enough" mean? The answer is: "enough" relative to some classification. Universalization is a process of resolving conflicts between classifications, but the point to note is that its operation is governed by still other classifications. These other classifications determine the application and meaning of universalization.<sup>26</sup> That is, they define the meaning of "enough" cases in the answer above. Thus we come to a crucial point, for it is not obvious that these further classifications are commonly shared across minds. If they are not, then universalization is conditional upon the particular classifications which underlie the process of universalization in each mind which

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<sup>26</sup> It is important to note that in legal contexts these other classifications could include "institutional" constraints on reasoning, as is pointed out in MacCormick (1978, 119-128). The "force" ("strength") of these constraints would depend, of course, on how these constraints are incorporated into the mind forming the judgment. It should also be noted that the fact that institutional constraints might be thought to exist independent of the will of any one individual does not imply that these constraints are shared across minds and hence, in the terminology of this thesis, they are not necessarily objective. Although it could be argued that one sense of "objective" requires "existence independent of individual's wills", this is not a necessary nor is it a sufficient condition within this thesis. "Objective" in the sense of this thesis merely implies that a classification is shared across minds.

universalizes. Universalization, then, is not necessarily objective, nor does it necessarily produce the same results for different minds. This is not to say that universalization is necessarily subjective, but merely that universalization on its own is not sufficient to produce objective results.

A final point might be made about universalization. It is frequently claimed that universalization is “merely” a *formal* requirement.<sup>27</sup> It might be asked why this is so. If the classification set over which a classification is universalized is *particularized enough* universalization is not merely formal but rather becomes *material* (or *substantive*).<sup>28</sup> Thus, one might claim that there exist *two* forms of universalization: *formal* and *material*. Formal universalization refers to relatively abstract rules which are relatively unlimited in their space-time reference, while material universalization refers to more concretized, less abstract, rules which pick out a smaller set of space-time. It must be pointed out, however, that there is a difficulty associated with the notion of material universalization. *If* there exist concretes which are in some way necessarily associated with a particular space and time, it might be difficult to claim that one *could* include these in a rule which is then extended *over* space-time. Put another way, if there are particulars which cannot be made the elements of a general rule *because* they are in some way restricted to a particular space-time, this might rule out their inclusion in a rule which is supposed to be applicable over a larger set of space-time. An example might be useful. Imagine a rule which in its expression uses universal terminology but in its application picks out a unique individual (a fingerprint rule, say, or a rule detailing DNA might be of this type). Could such a rule be universalized? If a rule *applies* solely to a very specific space-time location, it would be difficult to make the notion of “universalized” meaningful. In what sense is a rule “universal” if it refers to a single case? The answer is: in its *expression*. If, however, generality does not merely refer to the mode of expression of a rule, but rather depends upon its space-time reference, the universalizability of such a rule might be questionable. Seen in this light, the generality of expression is merely a necessary, but not a sufficient, condition for a rule being universalizable. The crucial matter, then, is whether or not that which is referred to by a

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<sup>27</sup> See, for example, MacCormick (1978, 73-99) and Paton's discussion of Kant's “categorical imperative” (1948, 61-62, 71-73), the formal nature of which is discussed at some length in *Foundations of the Metaphysics of Morals* (1959).

<sup>28</sup> Why is this so? It would seem that this claim is in accord with one notion of the formal/material dichotomy based on the set-theoretic notion that a formal set is always a subset of a larger, material set. Of course, if one were not using such a definition, one would not necessarily come to the same conclusions as above.

classification is universal enough to be considered an element of a universalizable rule. This is a question the answer to which depends upon the content, and not merely upon the form, of a rule.

### 13. Universalization and values

There is one final point which might be made concerning universalization, and it is one I shall return to later in the thesis when considering the principle of the Rule of Law from the perspective of a conflict-resolution mechanism. Universalization asks the question of whether or not a mind finds it acceptable to apply a rule at all points within a set. But what does "acceptable" mean? Acceptability is, in the final analysis, a matter of value (of intensity, of weight). The question is, then, whether the action which we are attempting to universalize is of sufficient "weight" to dominate other actions with which it conflicts within a set of actions which is itself closed off by criteria of relevancy which are themselves based on values? In which situations? And when does the intensity of the action diminish to such a point that another action overrides it?<sup>29</sup> That is, what are the boundaries of universalization?

It is obvious that the answer to these questions depends on the ongoing values in the minds of the group of individuals in question.<sup>30</sup> Thus, the universalizability of an action depends intimately on these same ongoing values. Universalizability, on this view, rests on a substantive foundation involving, ultimately, a test of the rank-order intensity of the actions in conflict. How, one might ask, does this relate to justification and, in particular, justifying arguments for the occurrence of particular actions? Articulated justifications are, it seems, the discovery and articulation of the conflicts between, and the *relative* intensity of, the actions in question.<sup>31</sup> Thus, an action is justified if it is higher in rank-order than the other actions with which it potentially conflicts. In the final analysis, justification is always

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<sup>29</sup> These issues, and the question of the source of intensities, will be addressed in a different context in chapter nine.

<sup>30</sup> And this is not all, for if these values themselves depend upon aspects of the environment in which these minds find themselves embedded, it may be the case that the intensity ranking of individuals' minds is interactively dependent upon its environment in a symbiotic manner. Thus, if it is the case that some of the intensities of mind are dependent upon the continuing existence of aspects of their environment, then it will be the case that the continued existence of these aspects will enter reasoning as implicit "presuppositions" which remain unquestioned for the purposes of any particular exercise. In this case, the presuppositions of reasoning are not merely those within mind, but also those aspects of the environment the existence of which are assumed, for the purposes of the reasoning in the particular case, to remain unquestioned.

<sup>31</sup> i.e. relative to other actions which might, but did not, occur.



based upon the relative intensity of the actions in question, with the most powerful action(s) being termed justified.<sup>32</sup>

#### 14. The nature of the application of rules

There is one final issue of some interest to the discussion of this chapter, and it is concerned with the application of rules, both within the realm of thought and to the “real” world. To introduce this topic, turn now to Bernard Jackson’s side of a debate between himself and Neil MacCormick concerning the application of rules to the external world (Jackson 1992, 203-214). For the moment, focus on a syllogism used in this debate:

- (1) All men are mortal,
- (2) Socrates is a man,
- (3) Therefore, Socrates is mortal.

Jackson asserts that:

[w]hen used in such a proposition, as opposed to an assertion, ‘Socrates’ is an indefinitely referring expression, not the name of a particular individual. There may be many people in the world called Socrates...the word ‘Socrates’ as used in [the] syllogism has sense within that propositional discourse; it is only when the syllogism is taken out of that propositional discourse, and it is applied to the real world, that ‘Socrates’ assumes reference to a particular individual”. (Jackson 1992, 205)

This reference to the real world is “ascription”, meaning “the speech-act of referring” (Jackson 1992, 205). These ascriptions “involve decisions” (Jackson 1992, 205). Though there is “a sphere within which the [Socrates] syllogism works *without* interference from ‘decisions’ — the sphere of pure propositional (or, for that matter, predicate) logic”, this is not the case when one asks “whether it applies” (Jackson 1992, 205). In other words, the question of whether “we regard phenomenon x as belonging to class y...does indeed involve a decision” (Jackson 1992, 210).

Now, that the domain of quantification of a syllogism or proposition needs to be specified before one can know the actual references made by a rule is true enough, but it is not this aspect of Jackson’s discussion upon which I wish to focus. Instead, my interest lies

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<sup>32</sup> “Powerful” being, from the definition of this thesis, the ability to exclude other actions from occurring.



in two slightly different issues. First, I wish to examine the implications of Jackson's statement that when the term "Socrates" is used in this proposition, it is an "indefinitely referring expression". Second, I wish to examine the *nature* of the "decision" which Jackson claims must be made in *any* act of ascription.

Is it, then, necessarily the case that "Socrates" is always an "indefinitely referring expression"? In the syllogism that Jackson considers, perhaps it is. In other syllogisms, however, this is not at all obvious. Consider a modified syllogism:

(1\*) All men having characteristics X are mortal.

(2\*) Socrates is a man having characteristics X,

(3\*) Therefore, Socrates is a mortal.

Are there then an indefinite multitude of people in the world called Socrates under the modified proposition (2\*)? Perhaps not. It would depend upon the set of characteristics X which pick out "Socrates" in time and space. The modified syllogism can restrict the space-time dimensions of the various propositions to varying degrees. At what point, then, does it cease to be a "universal"? In other words, at what level of particularity does a "universal" syllogism become a "particular" one? This question, concerning the level of abstraction of a syllogism, is of decisive importance. Can a proposition refer to the "real world" without requiring an ascription? This would seem to be impossible, for what is required is a specification of the domain of quantification of the proposition, and this, Jackson argues, always requires a decision. What seems to be overlooked by such an assertion is the way of getting around this that I have resorted to above. Basically, the modified syllogism above incorporates aspects of the domain of quantification *into* the syllogism. This means that the proposition "Socrates is a man having characteristics X" can become more and more detailed, more and more precise, *without* an explicit specification of the domain to which it is to be applied. The question, however, is whether such an increase in specificity could ever *eliminate* the act of ascription used in "connecting" a proposition to the "real world" and hence obviate the need for a "decision" which Jackson argues is a necessary feature of ascription.

Looking back at Jackson's argument, it would seem that the elimination of "decisions" is impossible. Why would this be the case? It turns out that Jackson's argument reveals that he divides the world into two spheres which can only be connected by "decisions". One is the

realm of “pure propositional logic”, the other is the “real world”. To connect these two spheres requires — according to Jackson — decisions. The question that must be raised at this point is why this is so. Consider the nature of the realm where no “decisions” need interfere: the sphere of “pure propositional logic”. Jackson argues that “[i]f the proposition that ‘all men are mortal’ is true, and if the proposition that ‘Socrates is a man’ is true, then the proposition ‘Socrates is mortal’ *must* be true” (Jackson 1992, 205, my italics). If, then, one is *within* the sphere of “pure propositional logic”, then one has *no* decision as to whether or not the conclusion is true.

This sheds light on the meaning Jackson ascribes to the term “decision”. Jackson is not arguing that it is *conceivable* that one could deny the conclusion of the syllogism, for this is certainly possible. One *could* simply not accept it. But this is not what Jackson means by one having no “decision”. Instead, he is arguing that if one is *governed* by the rules<sup>33</sup> of propositional logic, and one is *within* the sphere governed by these rules, then one has no decision to make concerning the truth or falsity of a syllogistic conclusion. This does not involve ascription, then, for one is merely “pondering the logical implications of the hypothesis that the claim is true — ‘and *if* Socrates is a man’” (Jackson 1992, 206). These “logical implications” are such, then, that one has no decision to make concerning the truth of the conclusion of this syllogism.

For the moment I shall leave unquestioned whether the existence of such a realm (where one has no decision to make) is a *possibility* and shall simply assume that it is (however, I will return to this important issue in due course). If, then, such a realm exists, this leads one to an interesting question: if one has no “decision” to make concerning logical implications *within* the sphere governed by rules of propositional logic, can there not be *other* spheres, governed by *different* rules, which eliminate “decisions” in a similar manner? Indeed there can. Under Jackson’s argument, one cannot be *within* “pure” linguistics and yet not obey the rules of grammar and semantics which govern it. Otherwise, one is not *within* the sphere. One has no “decision” to make *because* one’s being within a sphere is determined by one’s conformity to *its* governing rules. Nor can one be within, say, the sphere of “pure” chess and not conform to the rules which govern *its* sphere. There are, it would seem, many spheres in which one has no “decision” to make.

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<sup>33</sup> It should be emphasized that the term “rules” being used here does not necessarily refer to articulated rules, nor exclusively to relatively concrete ones.

But what has this to do with references to the “real world”? Surely there must be “decisions” to make when one refers to *it*? Perhaps one must “decide” — but *not* in the sense that Jackson uses this word. If one is *within* a sphere which is governed by certain rules, and it is one’s conformity to these rules which allows one to be within that sphere, then one can find that one has no “decision” to make *if* one wishes remain within that sphere. To see this, I will take what might seem like a rather roundabout approach. I will argue that there are situations *within* “pure” logic in which it seems that one *does* have a “decision” to make. Once I have examined how this result comes about, I return to this question and try to demonstrate that there are indeed situations in which one has no “decision” to make regarding the application of a rule.

To begin, then, imagine that I am considering the original syllogism and whether or not I accept its conclusion. Suppose I were to say that I do not accept the truth of the conclusion that “Socrates is mortal”. Jackson would claim that I have no decision to make on the matter. I must accept its truth — *or be outside its sphere*. This is what Jackson means by saying that there is no decision to be made *within* this sphere. But consider my argument: I do accept the rules of “pure” propositional logic, but I do not regard this *particular* phenomenon as falling under these rules. Thus, I regard the syllogism as an *improper application* of the rules of “pure” logic. For such an evaluation to be a *possibility*, it must be the case that there exist criteria *other than* those of “pure” logic which are used to judge whether or not the rules of “pure” logic have been applied *properly*. In this case, then, I seem to have to make a “decision”, for (to paraphrase Jackson) I must decide whether phenomenon *x* belongs to class *y*.

If this is the case, then Jackson is forced to argue that either one has a “decision” within “pure” propositional logic as one does in classifications over the “real world”, or he has to argue that one has no “decision” in “pure” logic *and* that the same may hold for classifications over the “real world”, which is contrary to his original assertion. He cannot, however, have it both ways. And *either* way, the implication is that that there is *no* difference between classification within the spheres of such “pure” logic and classifications over the “real world”.

## 15. The sources of Jackson's difficulties

What are the sources of this difficulty? There are two: one relates to a mistaken notion of abstraction, while the second goes to the heart of Jackson's argument. Consider the first. Jackson's first error is in presuming that classifications over particulars only occur when considering the "real world". This is manifestly false, for such classifications also occur *within* mind. Even if there is no reference to the world external to *mind*, there continues to be the need to distinguish particulars falling under (governed by) general rules. The Socratic syllogism that Jackson describes as belonging to the realm of "pure" logic belongs there only if it conforms to the more general rules of "pure" propositional logic. It is, then, a particular instantiation of a much more general syllogistic form. Jackson errs in assuming that such a syllogism is abstract because it is *expressed* in abstract terms, and because the terms of its reference are "indefinitely referring", but he overlooks the point that it is also *particular* in that it is a particular instantiation of the syllogistic form as governed by the rules of "pure" propositional logic. The reason, then, that it is a particular instantiation of a general syllogistic form, and the reason that Jackson would say that I have no "decision" to make, seems to be nothing more than that it is *obvious* that this example falls under the rules of "pure" propositional logic, or that somehow the rules of "pure" logic are "self-applying" (which he seems to deny as a possibility when one *applies* rules).

Jackson's second error is in a sense much more fundamental. Jackson has an implicit view that references *within* mind are somehow profoundly different from references to the "real world". This is a misunderstanding of decisive importance, and it seems to flow from two related but distinct assumptions. The first source of Jackson's difficulties is definitional, concerning his notion of the abstract and the particular (the concrete). To Jackson, "abstract" refers to the realm of thought, while "particulars" live in the "real" world. What he does not take into account is that the abstract/particular dichotomy can also be used in a *relative* sense *within* mind, to underlie comparisons of the relative space-time references of different rules. Jackson's errors stem from considering the world of the mind to be the sole sphere of abstractions, while the particular remains in the sphere of the "real world". This is, as I have argued, a false dichotomy, for *within* mind there are also abstracts and particulars. There is nothing "different" about mind's references to its own particulars, and mind's references to those that exist externally to it. Both either require "decisions" or they do not,

for both are concerned with the question of whether certain particulars are, or are not, governed by the abstract rules which govern the sphere in question.

All of this leads to the second source of Jackson's difficulties. The argument thus far might seem to be saying that Jackson has merely used the terms "abstract" and "particular" in an unhelpful and potentially misleading way, and that this has led him astray. But there is a more fundamental issue lying just behind this. This is that Jackson is implicitly assuming that mind is *not a part* of the "real world". This is perhaps why Jackson associates abstractions with thoughts, and particulars with the "real world". Implicit in this argument is the assumption that mind and thought occupy another realm, and that to connect to the world of particulars — to connect to the world at all — requires "decisions", "assertions" and "acts of volition".

It is put forward that Jackson's difficulties flow from an implicit presupposition which is on first glance unobjectionable. This is the belief that thought — and one subset of it ("pure" logic) — and the "real world" are fundamentally different, separated, and *separable* spheres. Once Jackson has *separated* logic from the "real world" (once he has separated the "abstractions" of mind from the "particulars" of the "real" world) there naturally arises the need for one to refer to another using ascription. Otherwise, how does thought "connect" to the "real world"? But is it not precisely *because* a separation between the world of thought and the "real world" is presupposed to exist that Jackson's difficulties emerge, and that the issue of connecting these two worlds becomes of such importance? Unanswered in all of this is the question of whether thought *can* be separated from the "real world", and the related issue of whether thought and the "real world" *are* so separate that there is a *need* to *re-connect* them.<sup>34</sup>

## 16. Jackson's "decision"

The path returns, then, to the difficult question confronting Jackson. It is important to be clear on what the issue is — and is not. The issue does *not* turn on some fundamental difference between areas of "pure" thought (with no reference to the "real world") and the

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<sup>34</sup> This is a notion of mind which, in the final analysis, is essentially dualist, in that mind is somehow separated from the "real world". I find such a theory of mind unacceptable for a variety of reasons, some of which are discussed in the final chapter of this work. One of the main reasons for rejecting this theory, however, is that it leads to difficulties such as those of Jackson, and forces one into the difficult position of trying to re-connect mind and thoughts with the "real world". All of these difficulties disappear when one accepts that mind and thoughts are a *part* of the "real world".



application of these thoughts. *Both* areas might require a choice over which classification to make, or *both* might not. But either way, there is no substantive difference between the two types of classification which would lead one to assert that classifying within one sphere does not require choice, while the other necessarily does. The issue, then, is whether one has a "decision" to make when classifying within "pure" propositional logic and over aspects of the "real world", or whether there are situations in which one has no "decision" in classifying such aspects. Consider a rephrasing of this question. Are there spheres, the membership of which is determined by one's conformity to rules, within which one has no choice in how to conform to these rules *and* at the same time remain *within* the sphere, or is there always a choice as to how to conform to a rule *and* remain within a sphere? The question, then, is whether there are spheres which are governed by rules, the *proper* application of which leaves one with no *acceptable* choice, i.e. under one's evaluative criteria for conforming to rules, there is no choice over which conduct to perform if one is to conform to the rules governing that sphere. This is, I think, the essential question. Presuming, then, that one wishes to remain within the sphere governed by a certain rule-set, is it possible that these rules are so restrictive that they leave one with no choice when conforming to them?

There are, it seems, two strands to consider which are relevant to the difficult decision facing Jackson. The first strand focuses on the effect of an increase in the particularity of rules on one's ability to conform to them. The second strand focuses on *how* increases in specificity decrease one's scope for choice by narrowing down one's acceptable choice as defined by some evaluative criteria. Consider the first strand. As I argued at an early point in this discussion, it is possible for a rule-system to specify increasing degrees of particularity. Consider, for example, the modified proposition that "Socrates is a man having characteristics X". As the proposition becomes more and more particularized, so the scope for its "indefinite" reference decreases. If we restrict its space-time dimensions, we will be able to focus ever more tightly on particular individuals. Clearly, it is possible to limit space-time reference in such ways. The question is, can it be narrowed to such a degree that one has no choice in the matter but to accept the result of a rule application that one may not like and that one would want to make differently if one could?

It would seem that such a result is indeed a possibility. If, say, a rule specified a particular sector of space and time under a set of rules for space-time that were governing that particular sphere, and further, one referred to an external event which was classified in

the same way by different individuals (such as colour), one might have no choice but to apply the rule to the situation. Or consider a rule which identified individuals by their fingerprints or DNA. If such a rule were restricted in space and time, could such a rule pick out unique individuals? Indeed it could. Does one's choice enter into the application of this rule? Perhaps not. The point is that it would depend on how detailed and specific the rule-system was which would govern the application of these rules, and the range of choice which such specificity would restrict. One could, of course, simply act contrary to the rules (by acting contrary to one's own evaluation of what the rules require), but then one would no longer be acting within the sphere governed by those rules. The decisive question, then, is how much increases in particularity narrow the choices which are considered *acceptable* or as *proper* applications of the rules to some individual. It is not *necessarily* the case, then, that rules can be applied in any way that an individual likes, nor that their application requires a "decision" in Jackson's sense of "being able to choose as one likes and still remain within the sphere governed by the rules". Rule-systems which eliminate choice are clearly a *theoretical* possibility, and rules of impressive detail have been incorporated into legal systems on occasion.<sup>35</sup>

Whether such systems of rules are *practical*, however, is another matter and indeed one of the reasons for failures of "formalist" systems in which all matters are specified by "self-applying" rules. It is also at best questionable whether such detailed rules could form the basis of a conduct governance system. In practical terms, the decisive question would be the *degree* to which rules reduced choice. This is a fundamentally important question, and it could be argued that the reason for some rules of conduct containing a vast amount of very complex and detailed conditions is that it is thought that until a rule is applied, it is *necessarily* abstract. This would be, however, the same conflation made by Jackson, i.e., between theory and abstraction, and between practice and particulars.

The second, and final, issue which must be addressed is implicit in the argument above: how does one determine that one (or another) has deviated from the rules *to such a degree* that one (or another) is no longer a member of the sphere under consideration. This, then, is the question concerning the evaluative criteria which are used to judge whether or not

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<sup>35</sup> For an example of the one such rule, consider the case noted by Hayek of a German customs rule "which, to avoid a most-favoured-nations obligation, provided for a special rate of duty on 'brown or dappled cows reared at a level of at least 300 metres above the sea and passing at least one month in every summer at a height of at least 800 metres'" (Hayek 1960, 489). This level of detail is only suggestive of much more detailed rules which could be constructed.

certain conduct is conforming to the rules in question. This is an extremely complex issue, and consequently I will only focus on one aspect of this more involved topic, this being the question of the *type of closures* which underlie an evaluative criteria. Jackson's discussion of "pure" propositional logic assumes that such evaluations (and consequently exclusions or inclusions) would be based on all-or-nothing closures. Under Jackson's evaluative criteria, I would have no "decision" to make because I am either conforming to the rules of logic, in which case I would be within the realm of "pure" logic and hence "bound" to accept the truth of conclusions governed by its rules, or because I am not conforming, in which case I would be outside the realm of "pure" logic and hence have no decision to make *within* the realm of "pure" logic. All-or-nothing closures underlie evaluative criteria which apply to situations where there is no choice to be made, where any deviation from any rule governing that sphere constitutes an exclusion from that sphere. Choice within the sphere is ruled out, then, by excluding those who do not obey its principles in the "proper" way — with "proper" being a criteria based on all-or-nothing closures. If the rules to which one must conform are restrictive enough to exclude individual choice in the matter of *how* the rules are conformed to, then such an exclusion can take place without individual judgment being made. But things are rarely this simple. Typically, the deviation from the rules governing a sphere are deviated from to a matter of degree. If this is the case, there must be a judgment made whether the deviation is of sufficient importance to constitute an exclusion from the sphere. This is a much more difficult question, and goes towards the consideration of justifications *why* one believes one is fulfilling the rules while others believe they are being contravened, whether one's reasons are sufficient to justify one's fulfilment of the rule, and so on. In the final analysis, this points to the need for a careful consideration of such criteria, a notable legal example of which would be the work of Neil MacCormick, including his *Legal Reasoning and Legal Theory* (1978).

## 17. Conclusion

The previous chapter examined the potential growth of objective rules of conduct. This chapter has looked at restrictions — *selection filters* — over this growth and their role in generating objectivity. It has examined two different processes of reasoning — deductive and non-deductive — under the framework of a classification model of mind. It has sketched out the outlines of the general structure of reasoning and considered the

restrictions imposed on reasoning by different particularity filters and examined their interaction with the impartial spectator perspective. It has also considered the process of universalization and put forward the view that abstraction refers not to the mode of expression of a rule but rather to its space-time reference. Finally, the chapter concluded with an examination and rejection of an argument which attempted to view the application of rules to external conduct as somehow inherently different from the application of rules to activities within mind.

With this chapter completed the thesis now turns to a discussion of one of the most significant properties of many of the rules generated by the application of the selection filters of the last two chapters — their negativity. As was discussed in the impartial spectator chapter, negative rules have different governance properties from positive rules. Negative rules, therefore, impose a different type of obligation from positive rules. All of this, however, presupposes that an intelligible distinction between negative and positive rules is a *possibility*. If it were not, how could one talk of the differing governance properties of each type of rule? It is important, then, to be to clearly distinguish between negative and positive rules. The majority of the discussion of the next chapter focuses on how one distinguishes between negative and positive rules and on objections to this distinction that one might raise. In the course of this discussion, several points are raised, which augment the analysis of the impartial spectator chapter, concerning the governance properties of negative versus positive rules. Finally, a few simple examples are given to illustrate the idea which underlies our emphasis of the importance of this distinction.

## Governance by Negativity

### Negative rules of conduct as a governance mechanism

#### 1. Introduction

The previous two chapters introduced the idea that negativity and negative rules have an important role to play in conduct governance mechanisms, and in particular those of a complex society. The chapter on the impartial spectator emphasized a mechanism for generating relatively objective rules, and pointed out that the rules which flow from the mutual sympathy mechanism were in large part negative. It also developed the idea that the governance properties of negative and positive rules are different, and that this difference is related to the ease, or difficulty, of obeying each type of rule. Finally, it began an examination of the connection between negative (undesirable) outcomes and negative rules which imposed an obligation of non-performance. The chapter which followed the discussion of the impartial spectator focused on some of the particular selection filters over reasoning which eliminate particularity from rules. It is these filters which, in combination with the impartial spectator perspective, potentially generate objective rules of conduct which are predominantly negative.

The Hayekian view, then, is that this negativity, and its manifestation in negative rules of conduct, provides an essential foundation for the mechanisms of law which govern a complex society.<sup>1</sup> Moreover, for a society to extend its spatial and temporal boundaries and increase in complexity, there must be an evolutionary transition from concrete to abstract rules of conduct. Now, while these views of Hayek might be well known, they are sometimes presented as the simple expression of a political view. I would argue, on the contrary, that Hayek's political views, and his emphasis on negative rules, flow from his insights into the properties of social conduct governance mechanisms. This change of

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<sup>1</sup> See Hayek's discussion of this in *Law, Legislation and Liberty* (1976, 35-44) and his associated references (1976, 162-164).



perspective, from one focusing on political ends to one grounded upon insights into the governance properties of different means, undermines political interpretations of Hayek's stress on negative rules. The previous chapter undertook the first steps in such a re-evaluation and considered negative rules from a governance mechanism perspective. The goals of this chapter are in a sense more foundational. My first and primary objective is to demonstrate how negative rules differ from positive ones, and to trace out the implications of such a difference. My second objective is to examine some criticisms of this conceptual dichotomy, and to see if, when, and where they go wrong. Third, I hope to lay one plank in the foundation for the following chapters, in that I shall be arguing that negative rules are an integral part of the mechanisms governing abstract and complex societies. Although the proposal to emphasize negative, rather than positive, rules also meets with a variety of objections, these will not be met in this chapter. This is the task of later chapters, and in particular, the three chapters which analyze law from a mechanism perspective.

There is one final point which should be mentioned. This chapter focuses for the most part on the difference between rules which impose an obligation to act and those which do not. As will be apparent in later chapters, the obligations to which I am referring are *not* the more concrete obligations which exist only in certain circumstances between individuals with a pre-existing concrete relationship (though there are of course exceptions, which will be noted in due course). Though of obvious importance, these more limited (in the sense of to whom they apply) obligations are not the focus of this chapter or this work. Rather, the discussion is limited to those obligations which extend across individuals in the social settings of an abstract society. This choice of perspective and its implications will not be a topic of discussion in this chapter but will instead be examined and justified at some length in the chapters which follow.

## 2. Summary of the argument thus far

The fundamental issue discussed in this chapter is the idea that there is an important distinction to be made between rules which prohibit conduct — negative rules — and rules which do impose an obligation to act — positive rules.<sup>2</sup> The argument will be that not only

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<sup>2</sup> Thus, in this chapter the normative sphere is divided into rules which impose an obligation to act and rules which impose an obligation to refrain from acting. The final sections of this chapter will introduce two other categories of rules — “permissive” rules (Schauer 1992, 8) and “power-conferring” rules (Hart 1961, 78) — but only the latter shall receive any detailed consideration within this chapter.

is it possible in certain circumstances to make such a distinction, but also that it is important to clearly distinguish between these different rule-types.

The qualification “in certain circumstances” is an important one. Much of the indifference to and confusions around the concept of negative rules of conduct stems from the failure to articulate the background assumptions which underlie such analyses. The role of this chapter, then, is to put the spotlight on these implicit presuppositions and to highlight their role in arguments concerning negative rules.

Now, it is of no small importance to be clear about what the argument has been up to this point. The previous chapters outlined some arguments for the importance of negative rules of conduct. There were two arguments of primary importance. First, it was argued that the goal of striving for objective judgments and conduct governance was both a possible, and an important, one. Taking this as a given, it was then argued that notions of serious harm were more widespread and shared in common across individuals (i.e. more objective) than were notions of pleasure and benefit. This claim was based on arguments concerning the greater evolutionary importance of avoiding serious harm relative to the striving for benefit and pleasure. If this is the case, one might adopt either of two different perspectives on how this impacts on conduct governance mechanisms. First, one could focus on the existence of harmful states of affairs. Second, one could turn attention to harmful events which occur or do not occur, and to the human conduct which brings these about. As I have argued in earlier chapters, and shall argue at greater length in this chapter, if one is interested in the conduct governance properties of different mechanisms, the latter perspective which focuses upon actions is a more productive approach to adopt.<sup>3</sup> Taking this as a given, one could then dichotomize harmful events into those whose occurrence leads to harm, and those whose failure to occur leads to harm. Insofar as the former arise from human conduct, negative, prohibitive, rules are an effective conduct governance mechanism (as one desires such events not to occur). Insofar as the latter relate to human conduct, positive, performance-prescribing rules are, in *simple* environments, an effective mechanism. The reason for the restriction to simple environments is that, as complexity increases, there exist increasing difficulties for *certain* forms of rules which impose an obligation to perform certain acts. I

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<sup>3</sup> None is this would argue, however, that action is in some sense more fundamental than states of affairs, nor that it is the primary concept, with states of affairs being a derivative notion. It merely states that if one is interested in *how* a mechanism governs conduct, one should pay more attention to rules which focus on conduct, rather than on those which solely refer to states of affairs.

refer to these forms of rules as “transfer-obligating”. For such rules, in relatively simple environments, it may be possible to know to whom, when and where a positive obligation to act is owed. However, as social complexity increases, such obligations become increasingly difficult to fulfil in a decentralized way, under *self*-governance.

### **3. The decisive difference between negative and positive rules lies in their differing degrees of abstraction**

The above discussion may be reframed in a way that sheds light upon one of the central concerns of this chapter and those that follow. One way of viewing the different types of rules outlined above is through their differing degrees of abstraction. Consider the following. Negative rules are continuously in effect. They are not “satisfied” by conduct which occurs at a particular point in time and space, but rather exert their obligation continuously over time. Moreover, the class of obligations under examination in this chapter and in the rest of the work (i.e. commonly-shared obligations) are addressed to no one in particular and everyone in general. Positive rules, on the other hand, are discrete, and call for a particular quantity of acts at particular points in space-time. There are two varieties of such rules. First, there are those which can be framed as “if you do X, then also do Y”. In other words, such rules impose an obligation to perform X in specific ways. Second, there are what I have termed “transfer” obligations, which call for the transfer of conduct from one agent to another.<sup>4</sup>

From the point of view of this chapter, the primary difference between negative and positive rules, and between the two varieties of positive rules outlined above, is their increasing degree of particularity (of reference). In other words, commonly shared obligations which are manifested in negative rules of conduct govern wider sets of space and time than do obligations manifested in positive rules, i.e. negative rules are continuously in effect, whereas positive rules are only in effect when one acts in a particular manner. Furthermore, when one considers transfer-type positive rules, the degree of particularity increases (transitioning from obligations continuously addressed to everyone, to obligations between particular individuals performed in particular space-time intervals).

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<sup>4</sup> As discussed in chapter four, in the examination of the relationship between undesirable outcomes and prohibitive rules.

This difference in the particularity of the reference of rules is important because of its impact on the governance properties of rules of conduct. Three such effects are outlined below.

#### 4. Implications of differences in particularity, I: the observer's epistemological advantage under mechanisms based on negative rules

The first effect of this difference in particularity is of some interest to *observers* of those who are governed by rules of conduct. Relative to violations of positive rules, observers have an epistemological advantage in observing violations of a negative rule. How does this come about?

This can be answered as follows. Concrete actions are actualized at specific points in space-time. Non-actualized actions, however, do not occur in space-time. Thus, this means that a negative rule can be *continuously* satisfied over a particular interval even if no actions occur. For a positive rule to be satisfied, the actions required by the rule must have occurred at some point in space-time (either during the interval under observation or before that interval). In a sense, then, one could argue that positive rules are satisfied by concrete acts, while negative rules are satisfied by more abstract conditions (i.e. the *lack* of a concrete act). Now, as a concrete act occurs at some particular point in space and time, while an act that does not occur does not, this implies that an observer must know relatively more (space-time) to verify conformity to a negative rule. That is, non-occurrences extend over a larger chunk of space-time and hence it is more difficult to verify that a negative rule has been satisfied than it is to know the same for a positive rule.<sup>5</sup> Flipping perspectives around, this means that it is easier for an observer to verify violations of a negative rule of conduct and more difficult to verify violations of a positive rule. This might, then, constitute one reason why social conduct governance mechanisms based on negative rules focus on violations. It might also be pointed out that governance mechanisms which rely on positive rules require

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<sup>5</sup> As an example of this, consider the following. Pick a particular interval of time, starting at  $t_0$  and ending at  $t_1$ . If a positive rule is instantiated at a particular point in space-time within this interval, its satisfaction must occur sometime between  $t_0$  and  $t_1$ . A negative rule, if instantiated over this same interval is satisfied at *every* point in the interval. Thus, if the positive rule is instantiated *before*  $t_1$ , this implies that there is less time required for an outside observer to know whether a positive rule is satisfied than is the case for a negative rule. This property is related, of course, to Karl Popper's distinction between verification and falsification, as discussed in Popper's *The Logic of Scientific Discovery* (1959) with elaborations in *Conjectures and Refutations* (1965).

verification techniques that are informationally more demanding than would be the case under mechanisms based on negative rules and their violations.

## 5. Implications of differences in particularity, II: the exclusion properties of rules in environments of different complexities

The second effect of the difference in particularity of negative and positive rules emerges when one focuses on their operation in environments of different complexities. Consider the following example, in which there are two forms of society, one simple and one complex. In a simple society, the set of actions potentially available to achieve an individual's ends is small relative to the set in a complex society. That is, the means to achieve particular ends are less numerous in a simple society than in a complex one. Now, given the alternative paths to the same end are less numerous in one form of society than in the other, what does this imply about the use of negative and positive rules?

This would depend in part on the level of abstraction of the rules in question. Assume for the purposes of this example that rules are relatively specific. In simple societies, then, with few available paths of action to any one end, whether one obeys a specific positive rule specifying a particular action or one obeys a negative rule which prohibits a specific action might seem to make little difference. For instance, if there were only two ways, X and Y, of achieving a particular end, imposing a positive rule for X or a negative rule against Y would lead to exactly the same path being chosen, assuming of course that the end was desirable and that one of the two actions *would* be chosen to achieve it. Even in this case, however, the governance properties of the different types of rules shows through. It should be apparent that a negative rule would allow an individual to do nothing (though this might not be a very appealing choice in this particular case), while a positive rule would demand performance of a particular action — in effect, *excluding* the choice of Y.<sup>6</sup>

Now consider a more complex action-set available in a complex society. In this context, the imposition of the specific positive rule for X implies, in effect, the exclusion of many more actions than in a simple society. The specific negative rule for Y, on the other hand, excludes only Y but not other paths to one's goals. Thus, the implementation of a specific

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<sup>6</sup> Note as well that that unless you preferred to have no choice at all, you could not improve your alternatives when governed by a positive rule *unless* this rule applies *differently* to some *other* individual so that they perform something beneficial *for* you. The explicit and concrete transferability of actions is one of the governance properties applying to positive rules.



positive rule over a large number of potential actions (i.e. means) implies that the rule will be able to determine the action of the individual obeying the rule *and* that a large number of potential alternatives are being excluded from performance. A specific negative rule, on the other hand, excludes only the particular action falling under the rule, leaving the choice of which action to adopt with the individual obeying the negative rule.

## 6. Implications of differences in particularity, III: the exclusion properties of systems of rules

The above discussion is related to yet another difference between negative and positive rules: their different *systemic* governance properties. Imagine a finite number of mutually exclusive actions (100, say) may be chosen by an individual within a 24 hour period. Assume, for simplicity, that each action takes one hour to perform. Now, impose on the individual 24 negative rules which must be obeyed, each one prohibiting one action from the set of 100. This leaves 76 actions, from which the individual can choose 24 to perform. Now consider the situation with positive rules. Again, assume there are 100 actions and that they demand one hour each to perform. Assume we impose 24 positive rules, which must be obeyed, on the individual. This means the individual is required to perform these actions *before* they choose their own actions. In this case, the individual will choose *none* of their own actions — their actions will be totally determined by the requirements of the system of positive rules.

## 7. Objections to the negative/positive dichotomy

The discussion thus far has highlighted the differences between negative and positive rules of conduct, and has emphasized their implications for conduct governance. Despite these considerations, remarkably little discussion is given to the differences between negative and positive rules of conduct. The reasons for this seem to be twofold. First, there are doubts whether such a distinction can even be made. Second, and assuming that the distinction is an intelligible one, there remain doubts as to its importance. In the sections that follow, I will attempt to undermine both of these doubts, my goal being to demonstrate that behind these objections lies a buzzing hive of confusions which only serves to highlight

the general indifference of traditional views of this dichotomy to the issues which are fundamental to an understanding of conduct governance.

Before turning to these objections, it is important to reiterate precisely what is meant (and what is not meant) by the terms “negative” and “positive” when referring to rules of conduct. This chapter, and the thesis as a whole, focuses upon rules imposing obligations. The negative/positive dichotomy is related to *how* an obligation is satisfied. A negative — prohibitive — rule of conduct can be satisfied if no conduct occurs. A positive rule requires that conduct be performed if the rule is to be satisfied.

It is important to keep in mind that this does not imply that a positive rule of conduct tends towards positive effects and a negative rule of conduct tends towards negative effects. That is, in this thesis the ascription of the terms “positive” or “negative” to rules of conduct does not reflect the beneficial or harmful effects of the rules under consideration. No judgment of utility is implied by these terms, whether it be in their immediate or more distantly connected effects. Within this chapter, these terms refer to rules which impose an obligation either to perform certain conduct or to refrain from performing certain conduct, with a positive rule demanding performance and a negative rule demanding that one refrain from certain conduct.

## **8. Distinguishing negative from positive rules: the background assumptions of the rewriting critique**

It is time, then, to turn to a consideration of some of the criticisms which have been made of the importance of distinguishing negative from positive rules. It should be noted that much of the argument has thus far presupposed that it is possible to distinguish a rule prescribing action from one which prohibits it. If this cannot be done, all the arguments concerning negative rules collapse. It is of decisive importance, therefore, to make clear the manner in which it is, and is *not*, possible to distinguish between the two different rule types.

I will do this by considering some objections to this dichotomization. Perhaps the most forceful of these is the claim that articulated negative rules can always be rewritten as positive rules. If this is the case, does it undermine my arguments concerning negative rules? Perhaps not. To see why not, consider a fleshing out of the “rewriting critique”. This critique claims that whether a rule is negative or positive is “merely” a matter of

perspective. Logically one can always rewrite a negative rule as a positive one. This fact leads to arguments that it is therefore a matter of indifference whether a rule is written in a positive or negative manner (as in any case one can always transform the one into the other). Hence, why all the fuss about negative rules?<sup>7</sup>

What is one to make of this critique? Is it correct? And, if so, is it a forceful one? I shall take an indirect route in answering these questions, and the questions I will address will be slightly different. There are two in particular of some importance. First, what are the implicit presuppositions of such a claim? And second, what do these reveal about those that make such an argument?

The first presupposition to note is the general indifference of the argument to both the content of rules and the contexts in which rules are embedded. If one takes the critique up on this point of indifference, many questions arise. For example, does the critique apply equally to rules which are abstract or concrete in their reference? Is the critique referring to rules of conduct, rules governing states of affairs, or both? What is the environment in which such rules are embedded? And is the environment in which these rules operate simple or complex?

Consider the question of the environment in which rules operate. That one's environment is important, and that it has an influence on the governance properties of a rule, should be obvious. There are two reasons for this.<sup>8</sup> First, conduct governance mechanisms operate

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<sup>7</sup> This view seems to be relatively widespread — so much so as to perhaps explain the relative lack of interest in the differences between the governance properties of the two types of rules. For example, in a conversation with one jurisprudential thinker, I was told that it was “obvious” there was no substantial difference between the two types of rules because every negative rule can be rewritten as a positive rule. Furthermore, his opinion was that Hayek's emphasis on negative rules reflected both Hayek's legal and philosophical “naiveté” and his political bias. As I shall point out, this jurist was presupposing (a) that Hayek uses a solely logical distinction to define “negativity” (he does not) (b) that a logical distinction is the only valid one (it is not), (c) that such a rewriting occurs *in practice* with enough frequency to be relevant (it does not) and (d) that whether a rule is formulated negatively or positively is a matter of indifference (this chapter argues that it is not). As I shall point out, I do not disagree with the claim that *logically* any negative rule can be rewritten as a positive rule. I merely think that it is *irrelevant* to the issue of whether there is a *significant* difference between negative and positive rules of conduct from the point of view of their governance properties.

<sup>8</sup> Actually, there are three. As I shall argue in the following chapter, the evolutionary transition from specific goals to general values as guides to action represents another reason for considering the environment in which rules operate. This property will be discussed at some length in the chapter which follows, so the discussion here will be necessarily brief. The general idea is that for rules of conduct to adapt to increases in environmental complexity, there must be an increase in the degree of abstraction of these rules. This increase in abstractness applies to the scope of reference of a rule. This in turn implies that increases in abstractness are associated with increases in the abstractness of the classifications underlying the rule — and this implies that rules which are grounded upon more general classifications will have a wider scope of reference. When one takes into account the *economy of mind*, i.e. the notion that there are a limited number of rules which can operate within mind, the upshot is that rules which are based on more general classifications — such as general, abstract, ongoing values — will be better adaptations to complexity than would be rules based upon particular goals. This is not to deny that particular goals are not adapted to particular environments. But for these goals to be adapted to more

within *ongoing* orders of action. Whether or not performance is required by a rule of conduct will depend upon whether that performance is already taking place, and this is intimately related to the issue of the environment in which an individual is embedded. For example, imagine an individual is in an environment in which there is an obligation not to look at certain images. If one is surrounded by such images in one's environment, and one is *already* looking, one would need to perform conduct to satisfy this obligation. Thus, in such a restricted environment, one satisfies a rule prohibiting conduct by performing *other* conduct (exiting the environment, closing one's eyes, etc.).

Secondly, and in a related point, the *complexity* of the environment in which individuals are embedded is of decisive importance for ascertaining the governance properties of the rule of conduct in question. In particular, being in an environment of restricted complexity is important because in such environments the *substantive* difference between not performing an act and performing an act is of little note. This is of importance when one is considering the difference between the two types of rules in situations where a concrete goal, which demands for its satisfaction that acts be performed, is presupposed to exist. If this is the case, the goal in a sense delimits the environment within which a rule guides conduct. Consider an example of two rules, one which obliges one to feed one's children, and the other which prohibits one from starving one's children. Is this not an example of the rewriting critique in action? And does this not demonstrate the lack of a substantive difference between positive rules and negative rules?

Perhaps not. The first rule imposes a positive obligation to act (and to feed one's children). The second rule seems to be a prohibition of certain conduct. But what conduct is this? Starving another person can come about from a *lack* of conduct, i.e. starving someone else can come about by not feeding them, or it can come about by acts which make it impossible for another to obtain such food. Which situation is being considered in the above scenario? If the rule refers to the obligation not to interfere with the ongoing actions of others in feeding themselves, and not to an obligation to perform actions *for* them, then it is indeed a negative, prohibitive, rule. But if the goal in this situation is to ensure that individuals feed their children, to whom such an obligation is owed, then such a goal will not be satisfied by individuals not acting at all, but rather requires that conduct take place so

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complex environments, there must be an increase in their number. Combine this with the limits to individuals' knowledge imposed by an economy of mind, and the conclusion emerges that abstract rules based on abstract values are more effective adaptations to increasing complexity.



that the obligation is satisfied. Whether this obligation is put into the form of a positive rule which requires feeding, or a negative rule which prohibits the lack of such conduct, the *goal* of not allowing children to starve can only be fulfilled by certain conduct taking place. Thus, both of these rules might be positive rules, depending upon whether or not conduct is required to fulfil them.

The question of importance, then, is whether an obligation can be satisfied by a lack of conduct or whether there must be conduct for an obligation to be fulfilled. Ask the question: if the individual to whom the obligation is directed ceased to exist, would the obligation be (or continue to be) fulfilled? If the answer is yes, then it is a negative obligation. If the answer is no, then it is a positive one. What, then, is the difference between the two rules outlined above? The difference lies in the underlying goal of ensuring that an action take place. Both are directed towards the fulfilment of a particular goal. Is there, then, a substantive difference *between* the two rules? From the point of view of this chapter, the substantive question when considering the negative/positive dichotomy is whether a rule can be satisfied by not acting at all. Can the obligation in either of these cases be satisfied by not acting? This is the decisive question.

This discussion illustrates the primary flaw in the rewriting critique: its failure to consider the effects of both the content of rules and the contexts within which rules operate. Moreover, this critique seems to miss the point that *how* a rule governs conduct is of no small importance. This is in turn directly related to one final presupposition of the rewriting critique which should be mentioned: its indifference to the distinction between rules referring to states of affairs, and rules which govern conduct.

From the point of view of this chapter, the fundamental difference between rules of conduct and rules over states of affairs is that the latter include no specification of the conduct which leads to these states of being coming into existence or ceasing to exist. As such, there is no direct connection between these states and *how* they are to be brought about, preserved, or eliminated. Such a connection, if it exists, is only implicit.

The upshot of this is that one must take care when examining arguments concerning the difference between negative and positive rules. Consider prohibitive rules. It is of some importance to be clear as to *what* is being prohibited, for a rule which prohibits certain conduct has different implications for conduct governance than does a rule which prohibits a certain state of affairs. The reason for this is that while a rule of conduct spells out the forms of conduct which are to be prohibited, a rule governing states of affairs spells out only the



state of affairs which one desires not to exist, and hence does not make clear which forms of conduct are to be considered the acceptable or unacceptable paths to the state of affairs in question. Thus, rules prohibiting states of affairs might require conduct to be performed if they are to be satisfied. Similarly, rules demanding the existence of states of affairs might require one to refrain from conduct if they are to be satisfied. The difference between rules governing conduct and those governing states of affairs, then, might be crudely put as the difference between rules which govern what people do as opposed to rules which govern things which happen. What does not seem to be realized, but what is of decisive importance, is that some things happen to individuals because other people do certain things. Insofar as conduct governance is concerned, states of affairs come about, persist or are eliminated through human conduct. And it is human conduct, either refrained from or performed, which produces states of affairs.

#### **9. Distinguishing negative from positive rules: a critique of logical and linguistic criteria**

All of this is related to a general critique of the theoretical concerns of those that put forward a rewriting critique as a decisive objection to distinguishing between negative and positive rules of conduct. Those who hold to such a view are oblivious to issues of conduct governance as pertains to performance, and are preoccupied with attempting to distinguish between negative and positive rules as articulations, as concepts, without regard to how they actually govern conduct. In fact, the view here seems to be that *formal* logical or linguistic criteria *ought* to be the ones which are used to distinguish negative from positive rules. In other words, formal logical or linguistic criteria ought to be the sufficient (and not merely necessary) conditions for distinguishing negative from positive rules. Most of the force of the rewriting critique flows from this assumption (i.e. if they cannot be distinguished on logical and linguistic grounds, they cannot be distinguished at all). The question that will be asked is whether this is a reasonable assumption.

Consider logical criteria. If one accepts that on logical grounds there is no fundamental difference between negative and positive rules, what does this entail? Nothing more and nothing less than that in terms of formal logic — judged by the criteria of logic — there is no fundamental difference between negative and positive rules. The question is: how does this affect arguments concerning negative rules? After all, if a difference cannot be based on

a test provided by logic (typically accepted as an important standard), of what value would such a differentiation be?

This is not the time or place to engage in a detailed critique of logic as a judgment criterion. It is necessary, however, to briefly point to some of its limitations as they relate to the arguments which will follow. Briefly put, those aspects which are typically considered to be the strong points of logic — its universality, its objectivity (flowing from its context-independence and abstractness) — are, in this context, its weaknesses. The fact that in theory any set may always be divided into A and not-A and that by simply relabelling one can transform negative rules into positive rules does not imply that in practice this relabelling is a simple matter, or that it is useful to transform rules in this way (both of which shall be discussed in more detail later on). Nor does it imply that such a relabelling actually occurs. It merely points out that it is *possible*. In my opinion, this is a rather weak critique. One could, I suppose, refer to oranges as not-apples, not-bananas, not-automobiles, etc., and one would have relabelled the world in the manner presupposed by the rewriting critique. But *do* we do this? Is it useful to do this? Is this a reasonable possibility? Perhaps in some situations it is. But in other situations it is not.<sup>9</sup> It is the abstractness of logic, its context-independence, which makes the rewriting critique irrelevant to the issues which are discussed in the following sections. Logic is a formal system. It imposes restrictions on the form of acceptable inference. It does not determine acceptable *content*. Whether a rule is positive or negative is not a formal property — at least not in the sense that I will use it — but rather a matter of its content. Hence, logical criteria are not conclusive in classifying rules as positive or negative.

Note that the comments apply equally to attempts to define negative and positive rules using formal analyses of language. One can argue that any negative rule which prohibits action *can* be rephrased as a positive rule requiring action, and that this being the case, the distinction between the two types of rules is merely a matter of wording and hence irrelevant. For example, consider the negative rule “do not kill”. One could use words like “avoid” and “refrain” rather than an “explicit” negation and thus claim that a rule such as “one must avoid killing another” is a positive rule. It should be obvious that this claim is just another form of the rewriting critique. It presumes, as did the approach based on logic,

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<sup>9</sup> If it were, it should be pointed out that not merely all rules but in fact all things of any kind which can be put into sets can, in principle, be relabelled in exactly the same manner, and hence any criticisms applicable to the negative rule, positive rule dichotomy also apply more generally.

that a negativity or positivity is defined by certain words appearing in a rule, and not by the *meaning* of the rule itself. This language-based approach searches for formal criteria of negativity. This is not how either Hayek or I use these terms. What is required is a consideration of the content of the rule. The fact that “negative” words are used in a sentence (i.e. “not”) does not make a rule negative. A “negative” rule refers to fact that a rule imposes an obligation to refrain from certain actions. This means that the rule can be satisfied by not acting. A “positive” rule imposes an obligation to act. These are the only criteria used in this chapter, and in the thesis more widely considered. Rules of language and rules of logic can be used to aid in the determination of whether or not a rule is negative or positive, but they are not sufficient criteria on their own. They are merely used as tools in attempting to determine whether or not a rule prescribes the performance of conduct.

#### **10. Reasons why one does not rewrite rules of conduct: the absence of duality and the change in degree of abstraction**

There are, finally, other grounds which undermine the argument put forward by the rewriting critique. Some of these have been mentioned in passing above. It is perhaps time to consider these in more depth. All of them may be considered as responses to a single question: “if in theory one can always rewrite a negative rule as a positive one, why is it in practice this very rarely takes place? Why *not* rewrite?” The answer to this question comes under two general headings, these being two reasons why it is not a trivial matter to rewrite rules from negative to positive. The first of these is the *lack of duality in articulation*, the second is the *change in the degree of abstraction* of a rewritten rule.

Turn to the first of these two reasons. To what does “duality in articulation” refer? Consider an example set out in two rules, the first negative, the second positive: (a) “one must not open a store” and (b) “one must close a store”. At first glance one might think that the effect of these rules is exactly the same (i.e. if the store does not open it must be closed). If this is the case, is there any point in arguing for the difference between negative and positive rules? I will argue that there is. The key point to note in the common perception is the supposed *duality* between a store being “opened” and a store being “closed”. That is, it is often assumed that if a store is not open it *must* be closed. But is this necessarily the case? What if the staff of the store were inside the store — taking inventory, say? Would the store be open or closed? “Closed”, one might say. Now, what if the people in the store opened

their doors to the general public but did not sell their products? What if they merely discussed with whoever came in the nature and business of the store. Is that “open”? What if goods were handed out at no cost? What if contracts, to be signed later, were handed out? The list of actions can go on and on. The essential assumption of the above example is now clear: that actions have *distinct* and *clear* “*opposites*” which completely exhaust the set of possible actions which could occur. In other words, the above argument assumes the set of actions can be divided in binary fashion into two sets — the set where the action occurs and the set where the action does not occur — *and*, crucially, that terms exists to *clearly* describe (name) both of these sets. Now, it is obvious that this is very often *not* the case. For example, what is the opposite action set to “kill”? Or to “assault”? These action sets have a large number of action sets which are *different* from, but *not* in opposition to, the actions of the original set. Moreover, as environments become more and more complex this feature becomes of greater and greater importance. It is trivially true that *in principle* there are only two sets of actions which can be considered within the framework of logic — action and not-action — but this does *not* imply that *in practice* a precise concrete description *exists* of both of these sets. Nor does it imply that such a binary division will be of value when complexity increases and the action-sets under consideration move from bivalency (opposites) to multivalency (differences).

Turn now to the second reason for not rewriting rules: the change in the degree of abstraction of the resultant rule. Consider two rules: “do not kill” and “act in such a way that you do not kill”. One difference between these rules is the scope of the obligation implied by each. The first rule — a negative rule — obliges one to not kill. So long as one does not kill, one satisfies the obligation imposed by that rule. Now turn to the second — positive — rule. This rule obliges one to act in ways other than killing. But — and this is the crucial point — it does not state the conduct which is obligatory. Thus, the set of obligatory conduct is potentially very large indeed. For this obligation to govern conduct, there would have to be a concretization of the conduct which is required to be performed — and it is precisely the way in which this concretization takes place which is of decisive importance. For the moment, however, the point to emphasize is the lack of symmetry between these two obligations. The obligation extended by the negative rule applies to a relatively specific form of conduct (killing), while the obligation extended by the positive rule applies to a much more inclusive set of conduct. Thus, in each case an obligation is being extended, but these obligations apply to different sets of conduct.

This change in the degree of abstraction (i.e. in the space-time reference) of a rule is related to the fact that although in theory any negative rule *can* be rewritten as a positive rule, in practice this rarely happens. The reason for this is simple: changing the form of expression of a negative rule into a positive rule changes the level of abstraction — i.e. the degree of specificity of its reference — of the rule. Thus, a negative rule prohibiting a very specific class of action (e.g. “do not drink wine in the corridor next to Neil MacCormick’s office in the law school between 5 P.M. and 5.30 P.M. on Thursdays”) would, when rewritten as a positive rule, be satisfied by a very general class of actions. Now, if the degree of specificity of the rule were unimportant to the function of a rule of conduct this qualification to the rewriting of rules might be safely ignored. A problem remains because this is not the case — the specificity of a rule *is* an issue of primary importance, for it determines how easy or difficult it will be to follow a rule and whether a rule achieves its desired effect. It is also intimately related to the authority structure which forms the context within which the rule operates, as we shall see later on in the thesis.

## 11. An evaluation of the rewriting critique

It is posited that the cumulative effect of all of these criticisms of the rewriting critique serve to dissipate its force. In effect, the claim is that that nothing of much importance rides on the fact that in principle negative rules of conduct can be rewritten as positive rules. The argument has been, then, that although it is possible in principle to rewrite a negative rule of conduct as a positive rule, there are good reasons why this does not happen in practice and that these reasons render the “in principle” argument of the rewriting critique quite irrelevant to the issues of whether one *should* in practice rewrite rules or whether it might be important to distinguish between negative and positive rules of conduct.

Now, nothing that has been said should be seen as detracting from the fact that the determination of whether an articulated rule prescribes performance or prohibits actions can be difficult in some cases. The aim of the next section is to point out some theoretical reasons why this might be the case.

Before turning to this, I would like to emphasize one further point. It is one of the claims of this chapter that a positive/negative rule distinction can be of the utmost importance. The fact, then, that rules *can* be articulated in an unclear manner, and that rules are in some cases complex combinations of negative and positive obligations, does not undermine the analysis



of this chapter. Rather, it reinforces it, for the argument of this chapter implies that rules *should* be clearly written so that an individual governed by them knows as precisely as is possible whether a rule is requiring or prohibiting conduct. The fact that some rules are difficult to categorize as positive or negative, be it from poor articulation or other causes, is *not* a reason for declaring that the positive/negative distinction is unimportant nor that its clear distinction should not be a *goal* towards which aspiring rule-makers strive.

## 12. Rules and closure

It would be foolhardy to deny that there are situations in which it is difficult to classify a rule as positive or negative. Consider the rule “avoid killing”. Is this a negative or a positive rule? It depends, crucially, on how one interprets the rule: if the rule is satisfied by refraining from killing, it is a negative rule. If the rule is satisfied by the performance of conduct other than killing, it is a positive rule. In other words, one can interpret the rule as “do act such that you do not kill” as “do not kill”. The former, of course, requires that some action be performed, while the latter does not. One might make the case that the rule “avoid killing” can quite reasonably be interpreted in either way. Why is this?

The answer hinges upon one of the more difficult aspects which underlies a theory of rules of conduct — the concept of *closure*. Though it is a complex notion, closure is also one of the most important elements of a theory of conduct governance by rules, and hence must be addressed. My strategy for doing so will be to consider a related and more obvious example, and then to return to the example above once this more obvious case has been discussed and understood.

What, then, is closure? I will introduce this concept by considering an example: the identification of an orange. Assume for the moment we are considering a genetically engineered orange, i.e. this engineered orange contains some apple DNA. Assume also that this engineered orange has some sensory characteristics of both an orange and an apple. That is, it looks, smells, tastes, and feels like an apple and an orange *to some degree*. Is it, then, an orange, an apple, or both? One could make an argument either way. It might taste more like an orange, but look more like an apple. Or it may feel like an orange in some ways and like an apple in others. The number of such conflicts could be numerous. Assume further that the struggle between those favouring “orange” and those favouring “apple” goes on indefinitely.

What is going on in the example above? What, then, drives this conflict? And how does it relate to closure? Recall, for the moment, the discussion of the previous chapter concerning the classification model of mind. Under this model, mind was constituted of numerous classifications and associated intensities. Under this model of mind, then, the aspect to emphasize in the conflict above is the presence of *incompatible classifications*. What, then, does “incompatible” mean? An incompatibility occurs when two classifications exclude each other. In other words, the individuals above are arguing that it is not possible *under their classifications of orange and apple* for an apple *and* an orange to occupy the same space at the same time. Under these classifications, then, something is either an apple, or an orange, but not both at the same time. This is directly related to the concept of closure, for each classification excludes the other being in effect. In other words, one classification closes off the possibility that another classification can govern the definition of the event (or object) in question. This incompatibility between classifications is, then, the basis of closure.

Now, when one considers the types of exclusions which might be possible, one realizes that there are *two* types of closure which are possible. First, one classification can dominate another in an all-or-nothing manner. In the example above (assume for the moment that only two alternative classification-sets are being considered)<sup>10</sup> this would mean that the object in question is either an orange or not an orange, or an apple or not an apple. This type of closure I refer to as a *quantity*, or *all-or-nothing*, closure. Such closures are based on the existence of a dominating set of classifications which override all other competitors. In other words, there is what I shall term an “unbalanced” conflict between classifications, with one side dominating the other. Now, this is not the only type of closure that exists. There is another form of closure called a *quality*, *intensity*, or *matter-of-degree* closure. This type of closure arises in situations where one classification does not dominate in an all-or-nothing fashion, but rather is engaged in an ongoing struggle to exert its effects. If one were considering the apple/orange debate above, this would mean that the object in question is to some degree an orange and an apple, and to some degree not an orange or an apple. Taken as a totality, then, the object would be both an orange and not an orange, an apple and not an

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<sup>10</sup> In other words, assume that the options have been closed off by a background set of exclusions and closures.

apple — *at the same time*. There is, then, some *overlap* between classifications.<sup>11</sup> This co-existence between classifications makes sense under the assumption that matter-of-degree closures are underlying the discussion. Note that such a co-existence would *not* make sense if one were assuming that all-or-nothing closures provided the foundation of the examination.

Having said all of this, are there any general comments which one can make about closure? The first thing to emphasize is that most classification conflicts will manifest elements of both all-or-nothing and matter-of-degree closures. Both types of closure have a role to play in rule-systems which govern conduct.

The second aspect to stress is that closures are manifestations of conflict. Related to this is the important point that the conflicts which are manifested in the linguistic formulations of rules are not merely conflicts between competing articulations. Rather, conflicts are between different classifications. These classifications are not necessarily articulated, nor are they necessarily conscious. None of this is to say that conflicts between articulations are unimportant, for they are. The point, however, is to emphasize that ambiguous articulations often reflect (and point to) other forms of fundamental conflict which underlie them. An ambiguous term in an articulation, then, is in a sense a symptom of an underlying conflict.

As an example, consider the term “avoid” from the example above. This word manifests conflict in that it is a *non-universal* prohibition. Non-universals implicitly embed conflicts between different classifications (in the same way as an articulated rule conflicts with its exceptions). This is, then, a conflict in “meaning”, where this term does not necessarily take on articulated or conscious connotations. Non-universals differ from universals in that the latter attempt to eliminate conflict by ignoring (excluding) possible conflicts. They do this by being based on all-or-nothing closures. Non-universals, on the other hand, are based on matter-of-degree closures.

The third point to keep in mind is that each side of a conflict manifests a perspective. Thus, one can see that from one perspective “avoid” and “refrain” may be “negative” (prohibitive) terms, while from another they might be considered “positive” (prescriptive). It is in part the exclusion properties of the terms involved which are crucial to the

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<sup>11</sup> As pointed out in the previous chapter, this idea is analogous to those made in the “fuzzy” logic literature. In fact, the distinction I am making between all-or-nothing and matter-of-degree closures maps directly onto the bivalent/multivalent dichotomy employed in bivalent and multivalent logics. For an entertaining, if slightly bizarre, introduction to the ideas of fuzzy logic, see Kosko (1993). For the more mathematically minded, see Zimmermann (1985) and Lin and George (1996).

determination of whether or not one takes the perspective that an articulated rule is negative or positive. The exclusion properties are themselves manifestations of the *type* of conflict present under a classification: with “evenly balanced” classification conflicts, we have matter-of-degree (intensity or quality) closures, while with “uneven” classification conflicts we have all-or-nothing (quantity) closures.

Fourth, and finally, it is of decisive importance to emphasize that there is an intimate relationship between closure, complexity, and the degree of abstraction of rules of conduct. As environments become more complex, abstract rules provide better guides to conduct, for they enable individuals to orient themselves more effectively than do more concrete rules. This move to increasingly abstract rules is accompanied by a transition in the closure properties of rules, away from rules grounded upon all-or-nothing closures, and towards rules based on matters-of-degree closures. The reason for such a change flows from the increased degree of overlap between increasingly abstract rules of conduct, engendered by a move away from rules focused on minimal conditions, and a move towards rules governing phenomena which presuppose that such minimal conditions have already been satisfied. Such a transition has an important implication. If it is desired that a conduct governance system be restricted to areas grounded upon all-or-nothing closures, such a system must restrict its scope to a *relatively narrower* set of phenomena than would be the case in less complex environments. All-or-nothing closures are closely related to the degree of commonality of certain classifications, and this commonality decreases and at the same time becomes more abstract as complexity increases.

To sum up, then, closure is, in the final analysis, derived from the incompatibility of certain aspects under certain classifications. Closure manifests a conflict, and it is the nature of the conflict and the strength of the opposing classifications to a struggle which determines which type of closure is under consideration. That is, evenly-balanced conflicts tend to be manifested as matter-of-degree closures, while one-sided conflicts tend to be manifested as all-or-nothing closures. And all of this is related to complexity. Increases in complexity imply evolutionary selection pressure favouring rules which are increasingly abstract, and such rules, because they encompass wider expanses of space-time, are more likely to be based on matter-of-degree closures. If one desires conduct governance to be based on all-or-nothing closures, then there is pressure to decrease the scope of such governance mechanisms such that this remains a possibility.



### 13. Implications of closure

Having examined the notion of closure, return now to the example given at the beginning of this section: “avoid killing”. To see why it might be difficult to classify this rule as positive or negative, note the *degree of strength* of the obligation imposed by the term “avoid”. It could perhaps be argued that *some* killing *might not* violate the rule. In other words, the obligation of the rule does not seem to exclude *all* actions of killing. In this case, then, it seems that this rule is based upon a matter-of-degree (intensity, quality) closure. Now, the question of interest from the point of view of classifying a rule as negative or positive is whether the rule implies an obligation to refrain from killing or implies an obligation to perform other conduct. One might argue that a more “natural” perspective would focus on an obligation to refrain from the conduct spelled out by the rule. On the other hand, one might claim that it is more “natural” to focus on the positive obligation of this rule. The important question, of course, is how *defensible* each perspective is.

Thus, the “focal point” of the closures — the particular perspective one has — becomes of crucial importance in determining which type of rule is more *closely* connected to the rule “avoid killing”. Is one focusing on the obligation not to kill; that is, is the rule “violated” if the actions of killing *do* occur? Or is one focusing on the obligation to perform acts other than killing, so that the rule is “satisfied” by the performance of this other conduct? Which perspective, then, does one adopt?

This would depend on the goals and values — the classifications — of the participants to a dispute. It would seem to be the case that *in principle* there always exists (at least) two perspectives on a rule, one negative and the other positive. Whether one adopts a particular perspective *in practice*, however, should depend not only on one’s goals and values but also on the *ability* of each type of rule — evaluated from the perspective of its governance properties — to support these same goals and values. One can make sense of the objection, then, that in principle and on logical grounds any rule can be framed as either negative or positive. That one *can* in principle do this does not imply that *in practice* one *ought* to do this, nor does it lead to the conclusion that there is no difference between negative and positive rules as judged by their relative abilities to support certain goals and values. Thus, it is sensible to argue that any rule *can* in principle be viewed from these two perspective — that is, any rule can be thought of as negative or positive. The important question remains whether in practice each perspective is equally valid. This chapter, in addition to the one



focusing on the impartial spectator and those which follow, argues that while it might be logically *possible* to view any negative rule as a positive rule, it may *in practice* be impossible for one form of conduct governance mechanism to support certain values, and hence in practice such a theoretical rewriting becomes an unattractive option. That it is not a matter of indifference whether an obligation refers to the prohibition of a particular action, or the demand for performance of a very general class of actions which would have to be concretized for the obligation to be fulfillable by individuals, is one of the central arguments of this chapter. The degree of abstraction of a rule of conduct, and of the obligation which underlies it, is of decisive importance for issues of conduct governance and the question of *how* such an obligation will come to be fulfilled. It is hardly a matter of indifference if one form of rule requires an authority structure which undermines individual autonomy, is unable to support the value of an objective resolution to disputes, and is incapable of sustaining social complexity.

The argument, then, that it is “merely” a matter of arbitrary choice which perspective one adopts for viewing a rule as negative or positive is a poor one. In certain situations there are values which we want to support which cannot be maintained by governance mechanisms based on positive or negative rules. In other words, in certain cases, and given a nexus of values which a group implicitly or explicitly require to be maintained, the ability to choose whether to resort to positive or negative rule based mechanisms disappears. Some conduct governance mechanisms cannot support — are incompatible with — certain types of values. In more concrete terms, certain ends cannot be achieved by certain means. There must be a matching — a compatibility — between the ends and the means (between one’s values and the means that one chooses to support these values) or conflict will result, with one consequence being the potential undermining of one’s values by the means one has chosen to support them.

The fact, then, that it may be difficult in some circumstances to choose between perspectives does not imply that it is difficult in *all* circumstances. Nor does it imply that the negative/positive distinction is not useful or that there “really” is no difference between the two types of rules. Though a rule may be couched in affirmative terminology, this does not mean a rule is positive. The point of decisive importance when considering rules as governance structures is whether the rule may, or may not be, satisfied by the non-performance of actions. Closure properties — the exclusion and inclusion properties of a rule — become important because in some situations it is difficult to *clearly* know the

circumstances in which a rule is satisfied. A negative rule prohibits action. But how does one differentiate between a rule which imposes an obligation to act and one which imposes and obligation to refrain from acting? In cases where an articulation has two potential perspectives, this comes down to a resort to the goals and values underlying each, and to the compatibility between these goals and values and the abilities of alternative conduct governance mechanisms to support them. It is the argument of the chapters that follow that if complexity and diversity are valued, if one supports individual autonomy, if one desires objective conflict resolution, or if one desires an abstract form of social relations or there is a need to resort to such relations, then one must resort to mechanisms based primarily upon negative rules of conduct.

#### **14. A final note to positivist readers**

It might be asked, particularly by readers of the legal positivist school of thought, how such categories as “power-conferring” rules (Hart 1961, 78), and “permissive” rules (Schauer, 8), are related to the discussion of this chapter. Moreover, it might be questioned whether a discussion of rules of conduct which focused predominantly on a positive/negative dichotomy is relevant to the important questions faced by legal theory in complex societies.

As an answer to the latter question of whether the positive/negative dichotomy is an important element in a legal theory applicable to modern, complex, societies, this entire chapter, and the chapters that follow, put forward the argument that it is. My interest in this chapter, and in the thesis generally, is upon the foundations of legal theory and legal authority, and the questions of interest from this point of view are *how* authority comes to exist and is sustained. This work thus focuses attention on the mechanisms of conduct governance which are capable of generating and sustaining regularity of human action which is presupposed in many arguments concerning the authority of law, and emphasizes both how the different properties of rules affect conduct governance in different environments, and how these properties impact upon the form of social regularity which arises from being subject to governance by rules of different types. From this perspective, and for all of these issues, the negative/positive dichotomy does have an important role to play.

As to the former issue, concerning the relationship of the analysis of this chapter and to the issue of power-conferring and permissive rules, there are a couple of point which might be made. First comes a specific issue concerning the perspective of the chapter. In this chapter the normative sphere is divided into rules which impose an obligation to act and those which impose an obligation to refrain from acting. Thus, insofar as power-conferring or permissive rules impose obligations, they are to be considered negative or positive rules, depending on the nature of the obligation. If they do not impose an obligation, but are rather descriptive of the pre-conditions for obligations to exist, they fall under the category of descriptive rules and hence fall outside the normative sphere under investigation in this chapter.<sup>12</sup>

Second comes a few comments which should be made concerning the *foundations* of the concept of power-conferring rules and their relationship to the negative/positive dichotomy set out in this chapter. The first comment is a general one, relating to this thesis as a whole. It can be argued that much of the discussion surrounding power-conferring rules deals with issues of authority (how it is transferred, rank-ordered, applied, etc.). But very little of this literature deals with *how* such rules lead to regularity of conduct. Instead, it is typically an assumption of such discussions that such regularity simply exists (or does not exist) as a “social fact”.

Why is there so little concern for the way in which different types of rules govern conduct? Though any answer to this question is to some degree speculative, if one had to pinpoint a single reason, it would probably be because it is often simply presupposed that the aspect of central importance with respect to conduct governance is their “authority”. The general idea seems to be that so long as conduct governance is in the “right” hands — i.e. the “authorized” hands — there remains little need to worry about issues of *how* conduct is *actually* governed. Nor is there much concern for the content implemented by conduct governance mechanisms. Again, there seems to be a general fall-back upon the belief that so long as whatever measures are implemented are “good”, that is the end of the story. Indeed, the entire notion of an investigation into how conduct governance mechanisms govern conduct is often represented as merely a “practical” problem, to be considered, if at all, as

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<sup>12</sup> Although not outside the scope of this thesis, which constitutes an investigation into those activities — those *mechanisms* (as opposed to “pre-conditions”) — which must be operating for obligations to come to exist and to be sustained.

an afterthought to the much more absorbing questions surrounding the issues of authority and those concerning conflicts between values.

This chapter, and the chapters that follow, argue against this. The general argument is that it is a mistake to believe that investigations into conduct governance should be primarily focused upon issues of authority. It is equally misguided to hold to the view that so long as conduct governance remains in the hands of the good, and that so long as the measures that it implements are the “right” ones, its operation will be for the most part unproblematic. Though these issues *are* important, they are not the end of the story. Setting aside for the moment the nature of the “good” in complex societies (and the argument that it is in fact the “bad” — the harmful — which is of central importance for issues of conduct governance in such societies), there exist still other issues which remain unaddressed — questions such as: what are the governance properties of the mechanisms under examination? *How* do they govern conduct? And what is the relationship between these properties and the role of such mechanisms in sustaining regularity? Complexity? Autonomy? Diversity?

This brings me to another, and final, point concerning power-conferring rules and their relationship to negative and positive rules of conduct. It might not be obvious that this type of rule brings with it its own set of presuppositions, one of which is intimately related to the discussion of this chapter. Power-conferring rules deal with alienating — externalizing — authority. As such, they necessarily presuppose that such authority *is* alienable. The question which rarely, if ever, seems to be asked concerning such a presupposition is its relationship to the form of obligation which is alienated. Given the discussion of this chapter, it can be argued that there is indeed such a relationship. Power-conferring rules alienate *positive* obligations, and confer the authority to perform certain conduct. The reason for this is that positive obligations and positive rules demand action at particular points in space and time, and for some obligations this action is transferable in the sense that that agent X can perform this same act and satisfy the rule for agent Y. Now consider a negative obligation. This is an obligation not to perform certain conduct. This obligation runs continuously over space-time, and for the class of obligations under investigation in this chapter (i.e. those which are the same for all), is addressed to all. Can such an obligation be alienated to another, i.e. can agent X “fulfil” agent Y’s obligation to refrain from certain conduct? Does this question even make sense? Probably not.

The reason for the divergence of these two types of rules lies in their different degrees of abstraction, and the asymmetry that this potentially engenders in satisfying their obligations. Negative rules manifest obligations which are not “satisfied” at a point in time by concrete action. Rather, they are *ongoing* obligations. In a sense, then, there are an infinity of non-performances, extending over every moment in time, which attach to particular individuals who satisfy these rules. Moreover, these obligations are symmetric, in that they are owed by all individuals to all other individuals. Contrast this with the positive rules, and in particular the class of transfer obligations discussed above. Such rules are discrete and can be owed from one party to a concrete other. Thus, it is possible for an obligation owed by X to Y to be transferred from X to another party if this party then performs the actions which are owed by X to Y. Moreover, such obligations are asymmetric in performance, in that one party is the giver of the action, while the other is the receiver.

All of this is related to legal positivists’ interest in power-conferring rules. Given their interest in authority and especially their presuppositions about the sources of social order which I will discuss in the chapter that follows, such an interest is hardly surprising. As I shall argue there, positivists’ interest in power-conferring rules stems from an implicit belief that authority *is* alienable, and that alienated authority in a sense takes on “a life of its own”.<sup>13</sup> What may be more surprising, however, is how such interests, combined with positivists’ lack of insight into the distinctive differences between positive and negative rules, and their emphasis on the deliberate creation of rules in the form of words, lead to theoretical difficulties at the very foundations of positivist thought. That such cracks appear where they might least be expected is in fact one of the central arguments of the chapters that follow.

## 15. Conclusion

This chapter divides the normative universe into two parts — obligations to perform certain acts, and obligations which do not demand performance. This much it has in common with traditional legal debate, which centres around which acts should be “permitted” to occur and which should be prohibited, with neither of these categories imposing an obligation to perform certain conduct. But this chapter goes forward in a

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<sup>13</sup> The familiar positivist argument that law may have any kind of content is merely one manifestation of this more general belief.



different direction, and focuses upon rules which impose obligations to perform and rules which impose an obligation to refrain from certain forms of conduct. These it terms “positive” and “negative” rules of conduct, respectively.

The argument is then made that it is both possible and in some cases important to distinguish between negative and a positive rules. It is not merely a desire for unbridled individualism which is behind this claim, but rather an appreciation of the different ways in which negative and positive rules govern action, which forces one to come to this conclusion. Regardless of whether one is in favour of decentralized individuals acting for their own purposes, or one supports a more community oriented notion of action, it is important to understand the different properties of each form of rule governance and the implications this has for their role in each type of society. The difference between negative and positive rules is not merely one based on the formalities of logic or linguistics, nor is it necessarily based upon a political preference. Rather, it is one which can be grounded upon an insight into the governance properties of different mechanisms. To satisfy a negative rule one must refrain from certain types of conduct. To satisfy a positive rule, one must perform conduct. It is the different ways in which each type of rule is satisfied which underlies their respective differences in conduct governance properties.

This chapter, and the ones before it, have argued that in situations of increasing complexity it will become increasingly difficult to resort to positive rules and the type of obligation that they impose and, at the same time, preserve autonomy, diversity, complexity, and objective decision making governing the conduct of all. The reasons for this are threefold. First, obligations governing transfers between individuals become increasingly difficult to fulfil through autonomous action in situations of increasing complexity. Second, as the complexity of social interaction increases, the exclusion properties of relatively concrete positive rules dictate that increasing numbers of alternative paths of action are excluded from individual consideration. More general positive rules which allow for more alternatives are possible but require a “filling in” of their content *if* concrete results are desired — and the question remains of *who* performs this “filling in”. Third and finally, social governance mechanisms based on discovering violations will impose a more demanding epistemic requirement upon observers if they are based on positive rules rather than on negative ones. All of these factors point to the conclusion that if one wishes to maintain abstract social relations, or if one is surrounded by substantial social complexity which one wishes to preserve (such as those associated with abstract, *Gesellschaft*-type

societies), there must be a resort to mechanisms of conduct governance based predominantly on negative rules.

It is important to note that none of this argues that positive rules are without benefits. In situations with numerous alternative paths of conduct facing individuals, positive rules can achieve concrete and specific goals, while in such situations it can be much more difficult (if not impossible) to achieve these same results using only negative rules. The difficulties with positive rules, however, stem from the same source as their benefits. *Whose* goals are being achieved? At what cost in terms of lost alternatives to individuals? And, in situations of increasing complexity, is it possible to specify positive rules such that individuals can obey them and continue to act in a decentralized manner? Or must there be a resort to a “filling in” of the content of these rules by those who know the desired specific results, with a consequent decrease in the ability of individuals to guide their own conduct? These are fundamental questions, requiring a careful consideration of the implications of resorting to rules which import substantivity and all of the difficulties that this entails.

Some of these difficulties are outlined in the chapters that follow. The thesis now turns to a general consideration of the interplay between individuals and their environments in situations of substantial social complexity. This leads to a sustained study of the relationship between individual and social conduct governance mechanisms extending over the next three chapters. The chapter that follows makes use of the insights of two legal thinkers — F.A. Hayek and Lon Fuller — and presents the outlines of what it terms a mechanism model of law. Once this has been completed, the chapters that follow turn to a examination of the implications of this notion of law, both for the principle of the Rule of Law and for the ideal of “social”, or distributive, justice. Finally, the thesis concludes with a consideration of a Hayekian theory of mind which underlies the theoretical analysis of this chapter, and that of the work as a whole.

# The Mechanism *is* the Message\*

## A mechanism model of law

### 1. Introduction

This chapter will attempt to draw together the various strands of thought discussed thus far into what might be called a *mechanism model* of law. It will do this by focusing on the insights of F.A. Hayek and Lon Fuller into the sources of social order and by sketching out some of the implications of these ideas for the causal connection between law and society. This chapter, then, attempts to unite the previous chapters into a coherent framework. It draws on the distinction between different forms of social order and examines the evolution of a *Gemeinschaft* to a *Gesellschaft* form of society, emphasizing a mechanism — abstract rule following — which might provide a foundation for such a transformation. It puts to work one particular method by which such rules might be generated — the mutual sympathy mechanism of the impartial spectator model — and outlines further filters on reasoning and justification which are used to sustain an abstract form of society. And finally, this chapter emphasizes two of the most important properties of rules of conduct which have passed through these filters and are capable of sustaining an ongoing, abstract type of society — their abstractness and their negativity.

The general goal of this chapter, then, is to outline the structure of a mechanism approach to law. This mechanism model is based upon a fusion of the insights of two legal thinkers: F.A. Hayek and Lon Fuller. Fuller's work is, in some aspects, very similar to Hayek's,<sup>1</sup> in that they seem to share many of the same theoretical concerns. Accordingly,

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\* The title is a modification of an expression made famous by Marshall McLuhan (1964), in a work heavily influenced by the seminal investigations of Harold Innes (1950; 1951). McLuhan acknowledges the influence of Innes by stating that an earlier work, *The Gutenberg Galaxy* (1962), was a mere "footnote of explanation" (McLuhan 1962, 50) to Innes' *Empire and Communications* (1950).

<sup>1</sup> This similarity extends to their more philosophical interests as well. One interesting example is Fuller's work, in 1930-31, on legal fictions (Fuller 1967) which explored the implications of the "As-If" philosophy of Hans Vaihinger (1924). This "As-If" theory stressed the interpretive nature of mind and emphasized the

my goals in this enterprise are twofold. First, I will take up a project that Lon Fuller began but did not complete: a theoretical examination of the bases of social order, and a critical analysis of the problems of institutional design. The theoretical and critical analyses which follow are adapted to, and influenced by, the works of both Fuller and Hayek. This leads to my second goal: to combine elements of Hayek's and Fuller's theories of law and provide the outlines of a synthetic and coherent legal theory that can serve as an alternative to some of the frameworks constructed by legal positivists. That an alternative is necessary flows from what I believe to be the two fundamental insights of Hayek's life's work. The first is the importance of clearly and carefully distinguishing between the abstract and the concrete. Hayek believed that positivists misunderstood both the nature and the importance of the process of abstraction. The centrality of this insight cannot be underestimated. Arguments based on the assumption of the primacy of abstraction underlie most of Hayek's social theory. His critique of distributive justice is but one aspect of this more general theory. In addition, most of his attacks on legal positivism (or, more accurately, Kelsenian legal positivism,<sup>2</sup> though I will argue that these objections can be extended to encompass more modern strains as well) are based on this same concern with the importance of abstraction.

Hayek's second insight relates to his first. Hayek came to the view that the *type* of social order which could be generated and sustained by certain mechanisms was intimately connected to the *way* in which these mechanisms governed behaviour. Furthermore, he was of the view that the manner in which a mechanism governed behaviour was intimately connected with the abstractness or concreteness manifested by the mechanism. In a sense, Hayek's argument was that certain types of societies were associated with certain types of governance mechanisms or, put differently, that conduct governance mechanisms must have certain properties if certain forms of social relations are to be sustained.

My ambition, then, is to outline a legal theory based upon Hayek's insights into the distinction between the abstract and the concrete and upon Fuller's reflections on the importance of institutional design. This theory will focus on the properties of different types of conduct governance mechanisms, and will examine the relationship between the different

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importance of abstractions to human thinking. As we shall see in the chapter which examines Hayek's theory of mind, these same concerns lie at the very heart of Hayek's theorizing.

<sup>2</sup> It is important to keep in mind that Hayek's notion of positivism refers specifically to *Kelsenian* positivism. Otherwise, Hayek's comment that "the work of Professor H.L.A. Hart...in most regards appears to me one of the most effective criticisms of legal positivism" (Hayek 1976, 56) might appear inexplicable. That Hayek objected primarily to Kelsenian positivism does not, of course, preclude an extension of some of his general themes to Hartian positivism, as I shall argue in this, and later, chapters.



types of mechanisms and the resultant forms of social order which each type is capable of generating and sustaining. The general argument will be that Hayekian concerns can be used in conjunction with the insights of Lon Fuller to create the basis of an alternative to positivist theories of law.

From the outset, it should be stated that my interest is primarily focused on the role of rules of conduct in *Gesellschaft*-type societies. I implicitly assume that there already exist a diversity of more commonality-based, *Gemeinschaft*-type societies within these *Gesellschaft*-type societies.<sup>3</sup> Assuming this is so, my goals are to examine how the members of these different and more commonality-based societies interact and integrate into more abstract societal forms. In particular, I am interested in how individuals adapt to increases in complexity<sup>4</sup> which are encountered when interactions take place *between* commonality-based societies, and in the relationship of these adaptations to the conduct governance mechanisms underlying a *Gesellschaft*-type of society. The reason for this interest is twofold. First, it is of some interest to see how individuals adapt to situations of increasing complexity. The general argument of the chapter is that they do this by adopting increasingly abstract rules of conduct. Second, and as an implication of this argument, comes the insight that such a method of adaptation also produces the potential for generating *objective* rules of conduct. The mechanisms for producing such rules and some of their properties have been outlined in previous chapters. What has not been emphasized is that these objective rules can serve as the basis for conduct governance *and* conflict-resolution in an abstract, *Gesellschaft*-type society. Thus, this adaptation to complexity also allows for the possibility of objective justice in disputes between the members of different *Gemeinschaft*-type societies. The details of the relationship between abstraction and the objective resolution of conflicts shall, however, form the basis of the investigations of the chapter which follows, and hence shall only be referred to in passing in this chapter.

This present chapter, on the other hand, examines the role abstract rules play in conduct governance by looking at a rather dated debate between two schools of legal theory. These schools of thought are the mechanism model approach that I have attributed to Hayek and Fuller, and that of legal positivists. The sections that follow use these two schools' distinctly different approaches to, and understanding of, the idea of "subjecting human conduct to the

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<sup>3</sup> The nature of these societal types will be discussed later on in the chapter.

<sup>4</sup> Speculation on the nature, sources and causes of such an increase in complexity will be discussed in later sections of this chapter.



governance of rules” to illustrate the significance of governance by abstract rules for individuals’ conduct in a *Gesellschaft*-type society.

With this aim in mind, this chapter will expand upon a few of the implications of the abstract/concrete dichotomy. First, I will focus on Fuller’s distinction between moralities of duty and aspiration, with a view to introducing the debate between Lon Fuller and his critics concerning his so-called “inner morality of law”. I will argue that this debate rests upon a confusion concerning the distinction between minimal conditions and that which is dependent upon these. Emanating from this confusion is a related misunderstanding of the role of abstraction and its relationship to, and importance for, issues concerning conduct governance and, in particular, the mechanisms which support social life in complex societies.

The discussion then turns to a more detailed examination of why Fuller believed his principles to be a “morality” and not merely a means to other ultimate ends. I argue that there are good reasons for considering the “inner morality of law” to be a value, and that this stems from the intimate relationship between the type of society which different governance mechanisms are capable of supporting. Flowing from this is a reassessment of the coherence of notions of an “inner morality of law” and “subjecting conduct to the governance of rules”, which in turn leads to an examination of Fuller’s critique of the managerialist tendencies of legal positivism. This section outlines what I perceive to be the two fundamental differences between Fuller and Hayek and their positivist critics: their notion of order and their views concerning the causal relationship between law and society. These differences in perspective provide the foundations for a re-examination of Hayek’s and Fuller’s notions of law. This consists of a consideration of the distinguishing characteristics of legal mechanisms from both a Fullerian and Hayekian perspective. Here, the argument is that law is a mechanism concerned with regularizing conduct, and that it is *this* function — and *not* positivist arguments relating to “authorization” — that makes it distinctly legal. Following from this is the argument that for conduct to be sufficiently regular, both the individuals obeying the law *and* the law-makers<sup>5</sup> themselves must subject their conduct to the governance of rules.<sup>6</sup> Related to this is an argument that one of the

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<sup>5</sup> The issue of *who* exactly are law-makers (which seems to imply that law is made), and the compatibility of this seeming inference with Hayek’s notion of law are discussed in the sections that follow and in the following chapter on the Rule of Law.

<sup>6</sup> In the case of law-makers, to the governance of the rules constituting Fuller’s “inner morality of law”.

primary functions of legal mechanisms is to filter out any attempts to subject individuals to the governance of particular goals.

Finally, the chapter concludes by outlining some of the implications of a Hayekian-Fullerian theory. In particular, it points towards a reassessment of the foundations of the principle of the Rule of Law and of the feasibility of distributive justice, and a re-evaluation of the importance of abstraction and the mechanisms by which it is generated.

## 2. Fuller's contribution and the positivist critique

So much for a general overview. What I want to do now is to provide a point of entry to Hayek's abstract/concrete distinction, and to the ideas underlying conduct governance using abstract rules. To do this, I am going to focus on Fuller's debate with his numerous positivist critics. As we shall see, this discussion leads quite naturally to a more general discussion of abstract rule governance.

To begin, then, I should point out the works to be examined. I will focus on the arguments of *The Morality of Law* (1964, 1969) and some of the critical responses this work engendered. The 1969 version of *The Morality of Law* consists of four parts. The first is concerned with distinguishing between duty- and aspiration-based moralities. The second makes a distinction between the inner and outer moralities of law, and outlines the principles constituting the former. The third section focuses on the outer morality of law and its relationship to the "inner morality", while the fourth section is a response to criticisms made against the original edition of the book. The first section to be examined will be Fuller's "reply to critics", following which the discussion turns to an analysis of the "inner morality of law" and the distinction between duties and aspirations.

For the moment, then, turn to Fuller's "reply to critics"; let us focus on the debate over the propriety of using the term "morality" to describe Fuller's "inner morality of law". It might seem a bit odd to examine a point which Fuller himself came to regard as quite fruitless (Fuller 1969, 203-204), but there are some good reasons for doing this. I would argue that Fuller never quite managed to articulate the basis of his disagreement with the positivists. The idea I put forward is that the objections and counter-objections which flew back and forth in this debate are manifestations of a fundamental difference in perspectives, one side of which has not yet been systematically explored. This chapter represents the

beginning of the rectification of this lacuna, and the beginnings of such a detailed investigation. That being said, onto the debate.

The positivist objection to Fuller using the term “morality” to describe his principles of legality can be summarized quite simply: Fuller has conflated purposive with moral action. His critics would prefer that Fuller use the term “efficiency” rather than the term “morality” in describing his principles of legality. Fuller counter-attacks by claiming that (a) positivists do not understand the meaning of this distinction and/or (b) the positivist notion of law is fundamentally different from his own (and the positivist conception of law is fundamentally flawed). This is, in short, a summary of the debate.

But what underlies these claims? Why do the positivists think Fuller is making a mistake by referring to his set of principles as a morality? And why does Fuller think that it is the positivists who are making the mistake? Who is in error? What errors are made? And how do these errors arise?

The sections which follow argue that the answers to these questions will only be forthcoming after one has examined two issues which provide the context for this debate. The argument is, then, that to understand this debate one must first understand the two issues of fundamental importance which underlie it. First comes the distinction between the minimal conditions for social life and those aspects which build upon this pre-existing foundation. This is related to the distinction between minimal duties and aspirations and to the difference between necessary and sufficient conditions, as discussed earlier in the thesis. Second comes the distinction between the abstract and the concrete. This is connected to the negative/positive rules dichotomy, and to the differences between values and goals. With a clear understanding of these crucial conceptual distinctions in hand, one is in the position to turn to a consideration of the distinguishing characteristics of guidance by morality as opposed to pursuing particular purposes. Once this has been completed one will perhaps be able to understand why Fuller thought it proper to refer to his “inner morality of law” as a morality, and to know why he believed his positivist critics were so profoundly confused.

### **3. Fuller on moralities of duty and aspiration**

The first issue to be discussed is Fuller’s distinction between aspirational and duty-based moralities. I will argue that far from being a peripheral element of legal theory, this distinction is one of the centrepieces of both Fuller’s and Hayek’s theories of law. Its

importance emanates from its relationship with (a) the informational and performative requirements of conduct governance mechanisms and (b) the negativity of the rules which constitute these mechanisms. The argument will be that duties are for the most part negative, that this negativity is related to the informational requirements of rule-based systems of governance, and that there is an essential and intimate connection between negative duties and legal mechanisms.

It might not be obvious that either of the two aspects, (a) or (b), are related to Fuller's distinction between the two types of morality. But consider the following. Fuller claims that his "inner morality of law...embraces a morality of duty and a morality of aspiration" (Fuller 1969, 42). At the same time, however, he argues that "the inner morality of law is condemned to remain largely a morality of aspiration and not of duty" (Fuller 1969, 43). In other words, his notion of the "inner morality of law" is based for the most part on aspirations rather than duties. This differs from the "basic morality of social life" in which "duties that run toward other persons generally (as contrasted with those running toward specific individuals) normally require only forbearances", i.e. they are "negative in nature" (Fuller 1969, 42). In contrast to aspirations, which are difficult to define clearly, such duties "lend themselves with a minimum of difficulty to formalized definition", i.e. one is "able to develop standards which designate with some precision...the kind of conduct that is to be avoided" (Fuller 1969, 42). To pick out some points of interest: Fuller argues that (a) the "basic morality of social life" is primarily prohibitive and (b) that these prohibitions are easier to formalize than are aspirations. He also argues (c) that his "inner morality of law" is primarily aspirational.

What lies behind these claims? I will consider two inter-related lines of investigation. The first examines the differences between an aspirational morality and one based on duties. In this context it attempts to explain why Fuller claims the "inner morality of law" is an aspirational morality. The second line of investigation is based on a more detailed consideration of the properties of duties and aspirations, and asks why the "basic morality of social life" might be composed primarily of forbearances. It asks whether there is a relationship between a minimum morality being negative and it being amenable to formalized definition. Finally, it questions what it is about an aspirational morality that makes it difficult to formalize.



#### 4. The distinguishing features of duties and aspirations

At first glance, the primary feature which distinguishes aspirations from duties is the presence of a stronger obligation in the latter. That is, some form of conduct is in some sense required (or prohibited) even if the individual does not want to perform the prescribed acts (or does want to perform the prohibited acts). In this sense, then, duties are in some cases independent of the desires of particular individuals. Aspirations, on the other hand, manifest the desires of certain individuals and are not in conflict with these desires. Another way to put this would be to say that duties exist independent of the particular desires of particular individuals, while the existence of aspirations depends intimately on some individual's particulars.

This is related to Fuller's claim that duties can be defined relatively easily, while to do so for aspirations is more difficult. Fuller's distinction between duties and aspirations hinges on the difference between relatively objectively defined acts and relatively subjectively defined ones. Fuller's claim is that the aspirational aspect of his "inner morality of law", with the possible exception of promulgation, is relatively subjective and dependent on perspective. Why might this be the case?

One answer would be that the notion of duties that is at play here is restricted to those forms which represent *necessary*, but not sufficient, conditions for social life.<sup>7</sup> As such there are evolutionary reasons why they would be more widely shared across individuals than would be sufficient conditions.<sup>8</sup> That they are necessary conditions (and necessary obligations) which are widely shared across individuals is related to three further properties of duties: (a) the greater strength of their obligation, (b) their relative objectivity, and (c) their negativity.<sup>9</sup> Thus, that duties manifest widely shared necessary conditions for social

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<sup>7</sup> This idea is similar to the one discussed in *The Morality of Law* (Fuller 1969, 9).

<sup>8</sup> As mentioned in the chapter on the impartial spectator.

<sup>9</sup> These conditions, however, are not sufficient to ensure that it will be relatively easy to formalize necessary conditions into *articulated* rules which are obeyable. For that to be the case, the rules also need to be based on actions observable to the acting individuals. If the knowledge and information upon which the rules depend is not widely accessible to external observers, then it becomes increasingly difficult to formalize rules (using Fuller's sense of "formalize"). Fuller seems to be arguing that the principle that rules should be promulgated is a formalizable rule because it can be based on criteria which are externally observable, and that the remainder of the rules governing the aspirational aspects of the "inner morality of law" are based to a greater degree on actions which cannot be observed with the directness of external conduct. It is the *type* of actions, their degree of "knowability" by observers, and the objectivity of their classification that is intimately related to the possibility of their formalization. An increasing standardization of classification occurs when rules are based less on knowledge / information which depends upon the particulars of individuals and more upon actions which have the same effects on classifications independent of which particular individual does the observing. It is the role of the filters introduced in the previous chapters to strip off individual-specific particulars. The argument I am



life explains their relationship to the will and individual desires: wills are more individual-specific, with aspirations being manifestations of these wills, while duties are in some sense *above* the will, independent of the will, and often contrary to the particular will of a particular individual.

## 5. Why duties are easy to formalize, why aspirations are not

If the notion of duties that underlies Fuller's discussion is constituted of widely shared necessary conditions for social life, this goes some way to explaining why duties are easier to formalize than aspirations. Aspirations are, in most cases, positive acts, things that one strives to achieve. Duties, on the other hand, are in large part negative. Ask yourself: do you aspire to refrain from performing certain actions? No, or at least not to the same degree as with the performance of acts. Why is this? Because duties are minimal conditions which are *expected* of individuals. One does not strive for them, in the sense of striving for the perfection of certain acts. Rather, one tries to meet their minimal conditions as a foundation for all of our other strivings. Once these minimal conditions are satisfied, and only then, do aspirations enter the picture. Aspirations are, then, *sufficient* conditions for the achievement of the "good" life. Duties, on the other hand, are *necessary* conditions for this life. Duties are concerned with actions which override all others, actions which are not substantially in conflict. Only in such a situation can the concept of "duty" retain a clear meaning. If there is substantial conflict between "required" actions it can become difficult to define what "duty" means. The more conflicts between "required" actions, the more difficult it becomes to define what is meant by "duty".

All of this is related to two of the defining features of duties: their heightened degree of compulsion (relative to aspirations) and their greater degree of objectivity. As negative necessary conditions are relatively commonly held and a *necessary* foundation for social conduct they will tend to be given greater weight than will, say, sufficient conditions. This greater weight allows these negative conditions to override other actions with which they conflict. This commonly held importance manifests itself as a heightened degree of *objective* compulsion, and it is this objectivity which leads to negative duties being

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making, then, is not only that knowledge of necessary conditions is more commonly shared across individuals, but also that this commonality implies that there is a greater degree of standardization of classification for necessary, as opposed to sufficient, conditions.

relatively easy to define in simple rules. Aspirations, on the other hand, are more diverse across individuals, and hence are not as commonly shared as these duties. The fact that they are not as commonly shared implies that there might be a greater degree of conflict<sup>10</sup> between the different aspirations of different individuals than there would be between the duties they obey, and hence that the degree of commonly shared “importance” of these aspirations would be less than for duties.

#### 6. Is the “inner morality of law” aspirational?

Why, then, does Fuller claim the “inner morality of law” is aspirational? The reason lies in the way in which Fuller defines his “inner morality of law”. Fuller’s “inner morality” *conditions upon* the existence of a “basic morality of social life” which is for the most part comprised of prohibitions. This “basic morality” is constituted of the minimum conditions for orderly social conduct. If these minimum conditions are not satisfied, social order, and its equivalent, social regularity, will not exist. If social order does not exist, it will not be possible to *perfect* rules which are to govern individual conduct, for no such rules will exist. In this sense, then, the “inner morality of law” consists of *two* parts: minimal conditions, which must be satisfied if law is to exist, and aspirational conditions, which *presuppose* these minimal conditions are in fact satisfied.

Fuller’s claim, then, is that without a bedrock of social regularity, law cannot exist. The aspirational aspect of his “inner morality of law” conditions upon a pre-existing social regularity and aspires to make it more regular. *If* the “inner morality of law” is in large part aspirational, this is *because* it presupposes that the minimal conditions of this “inner morality” have *already* been satisfied. If this were not the case, the “inner morality of law” would not be primarily aspirational but would instead consist of two parts, one duty-based and one aspirational. Fuller focuses on the latter because he assumes that the former has been satisfied. To put it somewhat differently, aspirations are based on *perfecting* the form of legal rules. The link between duties and aspirations lies in the fact that aspirations *presuppose* duties, i.e. they condition on them. Law is aspirational, and can be aspirational,

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<sup>10</sup> If duties represent necessary conditions, as I have argued, there would be very little if any conflict between them, and the existence of a conflict between them would begin to render the notion of duty less intelligible.

only to the extent that it fulfils the minimal necessary conditions for social existence implicit in the “inner morality of law”.

The aspirational element of the “inner morality of law”, then, strives to make conduct increasingly regular. Law is the activity of making conduct regular (i.e. subjecting human conduct to the governance of rules).<sup>11</sup> Law is not merely an authorized set of norms. To Fuller, law is a system of rules which helps individuals to make their conduct regular (by subjecting their conduct to the governance of rules). It is not merely concerned with authorization, for not all that is authorized leads to individuals acting regularly. Indeed, authorized conduct might lead to an increase in the irregularity of individual conduct. If authorized conduct is to facilitate regularity on the part of those who obey it, then those who have authority must act in a way which makes this possible. This means that they must act regularly, which means that they too must subject their conduct to the governance of rules — the rules of the “inner morality of law”.

## 7. The negative nature of the “basic morality of social life”

All of this is related to a primary property of the “basic morality of social life”: its predominant negativity. Previous chapters have argued that there are evolutionary arguments which would lead one to expect that negative, prohibitive, rules of conduct would be better adapted to guiding autonomous individual conduct in situations of increasing complexity (*why* one would want to focus specifically on *autonomous* conduct governance will be dealt with in due course later in the chapter). Thus, if one aspires to perfect the enterprise of subjecting conduct to the governance of rules, and one is faced with an environment of substantial complexity, one may find that one is forced to increasingly resort to rules which in their content do not prescribe duties to act but instead merely prohibit the performance of some forms of conduct. Why would this be the case? The argument, as outlined in previous chapters, is based on the operation of rules of conduct in situations of complexity. Negative rules of conduct, in the sense of rules which prohibit behaviour, manifest minimal necessary conditions for social interaction and are less demanding to

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<sup>11</sup> This definition makes it clear that there will be areas where one will not desire to subject human conduct to the *direct* governance of legal mechanisms. Such areas are those where regularity is a handicap, and where adjustment to context and space-time specific information is of greater importance than acting with regularity (and hence ignoring context or environment specific knowledge and information). Of course, the point of decisive importance and maximal difficulty is in differentiating between these two different knowledge and informational environments.

implement than positive rules which impose a duty to act. Thus, if one desires to subject behaviour to the governance of rules, and one is faced with situations of social complexity, it may be more effective to use negative rules which prohibit conduct and which do not impose an obligation to act than it would be to impose positive obligations to act. Negative rules of conduct in a sense provide the minimal necessary boundaries for action which must be for the most part obeyed if social interaction is to be possible. Negative rules of conduct, then, outline the conditions which are necessary if individuals want to achieve their goals. Positive rules of conduct, on the other hand, are often more complex than negative rules. If they impose a duty to act on some individuals, they require a supplemental mechanism which can allow one to know when and to whom a duty is owed. This additional complexity implies that if one aspires to have individual conduct come under the governance of rules, and one considers the performative complexity of these rules from the point of view of those obeying these rules, it may be more effective to subject them to the governance of *negative* rules. Of course, this does not imply that *all* necessary conditions can be realized using negative rules. Some such conditions would require the use of positive rules, as the resort to using negative rules does impose restrictions on which conditions can be realized. The point to emphasize in this regard, however, is that these positive rules are, in many cases of interest (and in particular, when what I have termed “transfers” are being considered), informationally and performatively more demanding than are negative rules which do not impose duties to act, and that this increase in complexity should be taken into consideration when one is considering the type of rule which might be used to govern conduct.

## 8. Summary of the argument

It is time, perhaps, to summarize the argument. The focus has been on those features which distinguish an aspirational morality from a duty-based one. One element is the degree of compulsion which each morality demands. A duty-based morality does not present choices. Rather, it makes demands, and these might be contrary to the desires of *all* individuals. An aspirational morality, on the other hand, must manifest the desires of at least some individuals. Now, why does Fuller claim that the “inner morality of law” is aspirational? He does this, I believe, because he presupposes the duty element of this morality has been satisfied. Only if these minimal conditions have already been met does his argument make sense. Fuller further argues that these minimal conditions — duties —

are for the most part prohibitions of certain types of actions. Why prohibitions? Because duties represent *necessary* conditions for social life, and because mechanisms based on negative necessary conditions are in many cases informationally and performatively less complex than those based on positive necessary conditions and hence there is reason to believe that such mechanisms would better survive cultural evolutionary selection pressures.

The exact same reasoning applies to the question of why negative necessary conditions are easier to formalize than positive necessary ones. In other words, it is because negative necessary rules tend to be addressed to single individuals (making them informationally and performatively less complex than positive necessary conditions), combined with the fact that necessary conditions would be expected to be commonly held and hence relatively standardized (relative to sufficient conditions which would be more heterogeneous across individuals), that leads to their greater ease of formalization.<sup>12</sup>

## 9. Fuller on duties and aspirations: some criticisms

By now, one might be wondering how duty- and aspiration-based moralities are related to legal governance. Consider the following. Fuller argues that his “inner morality of law” is aspirational. I have examined this, and have found that this “inner morality” is comprised of *two* parts, one duty-based and the other aspirational. Fuller concentrates his attention on the aspirational elements of this “inner morality” because, as already stated, he *assumes* that its minimal conditions have been satisfied. In my view, this is a strategic mistake, for the essential function of the “inner morality” is *two-fold*.

First, there is a minimum set of conditions which must be met if social relations are to be maintained. This is an essential function of law. Fuller points out, but does not emphasize, that in abstract societies this function is implemented primarily by negative rules. This is a point of decisive importance: the minimal conditions required by a complex *Gesellschaft*-type society must be implemented by predominantly *negative* rules (an assertion I attempt to justify by resorting to informational and evolutionary arguments). This chapter (and the others of this thesis) make the argument that the negativity of these minimal conditions is an essential element of the conduct governance mechanisms of complex, abstract societies, and hence is of fundamental importance to a coherent notion of law in such environments.

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<sup>12</sup> As pointed out above, for this argument to work there would also have to be a relatively standardized connection between external conduct and internal states so that objective judgment could be a possibility.



Furthermore, it emphasizes the connection between this negativity and the degree of obligation which accompanies a rule (i.e. the distinction between a duty and an aspiration). It has been argued that if one recognizes that there exists a complex pre-existing social order, and one wishes to preserve its abstract form, then duties (which have a greater degree of obligation) must be restricted to negative rules. Thus, if the “purpose” of law is to generate and support regularity, and this is of the kind demanded by an abstract, *Gesellschaft*-type society, then it must resort to *negative* duties as its primary tool.

Second, there is an aspirational element to the “inner morality of law”, which is concerned with the *perfection* of these minimal conditions. This is the aspect which Fuller emphasizes,<sup>13</sup> and it is this emphasis which I consider to be a strategic error, for two reasons. First, such an emphasis obscures the fact that many of the failures of law have not been failures of the aspirational element of the “inner morality”, but instead have arisen through failures to meet the basic minimal conditions of this “inner morality”. In my view, it is not the failure to *perfect* law which has been of decisive importance, but rather the outright failure to meet the minimal conditions of law, in part engendered by the desire to implement aspirations other than those which Fuller enumerated, which should be emphasized.

This way of putting it points to my second objection. This is that Fuller’s approach does not adequately stress the relationship between duties and negative rules and aspirations and positive rules. This assumes an even greater importance in a complex, *Gesellschaft*-type society. An understanding of this connection can lead to the insight that many failures of law have occurred because of the attempt to implement aspirations which have conflicted in varying degrees with the minimal conditions imposed by legal mechanisms. Fuller’s lack of stress on the minimal conditions of his “inner morality of law” leads him to pay little attention to the connection between positive rules and aspirations, and hence to the role aspirations play in *undermining* the minimal conditions upon which all such aspirations depend. This interactive effect is of no small importance, and indeed coincides with many of Fuller’s own concerns. It is, then, regrettable (though perhaps in some ways understandable) that Fuller chose to emphasize the perfection of law rather than its minimal attainment, for such a change in emphasis is consonant with his abiding concern in the interactive nature of

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<sup>13</sup> Though not to the complete exclusion of emphasizing the minimal conditions necessary for law’s existence, as is made clear by his discussion in “A Reply to Critics” (Fuller 1969, 197-198).

law, and with the perfection of law, once it is ensured that law has indeed come into existence and is capable of being sustained.

#### 10. A Fullerian objection to positivist “efficiency” arguments

Both of these criticisms are essential qualifications to the context within which the debate concerning the propriety of using the term “morality” to describe Fuller’s principles of legality takes place. If one is interested in understanding Fuller’s argument, it is important to keep in mind the background assumptions which he is taking for granted. The general idea, implicit in the discussion above but not stressed with sufficient force by Fuller, is that aspirations rest upon a bedrock of standing obligations, and that these obligations — these duties — are the minimal conditions for social action (unlike aspirations, which are sufficient ones). These ongoing minimal obligations contrast with aspirations in that (a) they are relatively commonly shared across individuals, implying that they are relatively objective (b) they have a greater obligatory strength, and (c) they are abstract and in large part negative. The general context resting behind Fuller’s arguments, then, is that there is a fundamental difference between minimal conditions and aspirations which condition upon these minimal conditions being continually satisfied. The idea is that one is able to have particular goals only because those conditions, which one shares with all other organisms having the same abstract structure, have been satisfied. Such minimal conditions are pre-conditions for the more particular goals of particular individuals. Such minimal necessary conditions are not necessarily in accord with the particular will of particular individuals, nor are they necessarily conscious, or the product of choice or deliberation.

The general conclusion which one may draw from this is that the aspirations of individuals depend upon the continuing existence of more generally observed minimal obligations. It is of the utmost importance that one keep in mind that these obligations are more abstract than the aspirations which condition upon them. That is, these obligations are more enduring across time and space, and remain the same in a wider variety of circumstances and environments. The importance of the abstract nature of these minimal obligations in the present discussion is that it is this property which connects them to Fuller’s objection to the use of the term “efficiency” to describe what he calls the “inner *morality* of law”.

The general theme underlying Fuller's objection to this usage rests on the implicit presupposition that efficiency is a notion which is properly applied in environments in which minimal conditions have *already* been satisfied.<sup>14</sup> References to the efficiency aspects of law stand in contrast to, and build upon, a background set of aspects which are associated with the minimal conditions which must be satisfied if law is to exist. Fuller, then, is implicitly arguing that in many cases when positivists are discussing issues of "efficiency" in law as it relates to his "inner morality", they are actually discussing the minimal foundations upon which the notion of efficiency is based. In this way, issues of efficiency are conflated with issues concerning the pre-conditions for *any* evaluation of efficiency. In other words, the argument is that his positivist critics simply *presuppose* that they are within a realm in which evaluations of efficiency are a *possibility*, without specifying or paying attention to the pre-conditions upon which such evaluations depend.<sup>15</sup>

From Fuller's perspective, then, it is the fact that his positivist critics do not take into account the connection between the minimal conditions of social interaction and *how* these minimal conditions are generated and sustained which leads them to argue that the "inner morality of law" is merely a tool to make law more efficient. Note that this view presupposes that law *pre-exists* the application of these principles. From his critics' perspective, Fuller's "inner morality of law" is merely a set of principles which make law more "efficient" because these critics presuppose the "legal quality" *already* exists. This is an issue of decisive importance: the positivists' view presupposes that law exists independent of the application of the principles of the "inner morality of law". In other words, the positivist line is that the application of these principles is *not* a necessary condition for the *existence* of law, but is instead merely a means to its perfection (or imperfection).<sup>16</sup> On this view, Fuller's principles are not moral principles because they are not values; rather, they are merely means to various other ultimate goals (ultimate values).<sup>17</sup>

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<sup>14</sup> This distinction is at the base of another dichotomy which Fuller discussed, the difference between reciprocity and marginal utility (1969, 15-27).

<sup>15</sup> It is perhaps important to note that this critique extends more widely, and could be applied to what has come to be known as "the economic analysis of law". For more on this perspective, see the collected work of one of its founders, Gary Becker (1974), and the analyses of one of its most important exponents, Richard Posner (1981; 1986; 1992). For a textbook introduction, see Cooter and Ulen (1988), while for one example of its application to a specific area of law (torts), see the analyses of Shavell (1987) and Landes and Posner (1987).

<sup>16</sup> Though as Fuller points out (Fuller 1969, 197-198), the positivists do seem to agree with him that these conditions must be met, although, as this thesis has argued, they do not seem to understand the implications of such pre-conditions for law and the existence of a "legal quality".

<sup>17</sup> A difficulty in terminology arises because positivists are, in general, not concerned to clearly distinguish between the different properties of, what I have here termed, "goals" and "values", such as their relative degrees

To the critics, following Fuller's principles makes law more obeyable, *inter alia*, and if this is assumed to be a goal, then law which conforms to Fuller's principles becomes more efficient in guiding individuals' actions. From this perspective, making law more obeyable is one goal. But there can be others. Raz lists a wide range of such ultimate goals, including "democracy, justice, equality (before the law or otherwise), human rights of any kind or a respect for persons or for the dignity of man" (Raz 1977, 211). A legal system and its laws can be judged relatively efficient or inefficient to the degree they achieve ultimate goals, whatever they may be. To Fuller's critics, then, subjecting individual conduct to the governance of rules is not a value, but rather a means to other values. As H.L.A. Hart puts it,

only if the purpose of subjecting human conduct to the governance of rules, no matter what their content, were itself an ultimate value, would there be any case for classing the principles of rule-making as a morality, and discussing whether it was a morality of duty or aspiration. (Hart, *Essays*, 351)

Surely, Hart seems to imply, Fuller does not intend to claim this. Hence he must be committing a category error in calling such an enterprise a morality.

The discussion above implies that Hart's implicit assumption is incorrect. At least one strand of Fuller's argument *can* be used to support the claim that Fuller did indeed view the enterprise of subjecting human conduct to the governance of rules as a value. I would argue, contrary to Hart, that at least to some degree Fuller did hold a similar view, but that this was obscured by his somewhat confusing discussion of the relationship between minimal conditions, aspirational and duty-based moralities, and the "inner morality of law". The obscurity of Fuller's argument notwithstanding, it is, I think, the duty-based, minimal conditions strand of his argument which allows one to argue that it is a mistake to think of his "inner morality of law" in efficiency terms. Fuller's argument (or, more accurately, one strand of this argument) is that it *is* proper to refer to his principles of legality as a morality because such principles *are* an "ultimate" value in that they are a minimal condition for the existence of social order and in particular, of the type of social order that Fuller (and Hayek) are concerned to preserve.

Is there any possible resolution to the disagreement between Fuller and his positivist critics? Or are these protagonists doomed to talk past each other, agreeing only to differ in their value judgments? I think a potential resolution is possible, and believe that some

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of abstraction, etc.. As a result, it can be difficult to know if they are referring to "goals" or "values" as those terms are used in this thesis.



progress can be made towards this by asking why subjecting human conduct to the governance of rules *could* be a value. Once this is understood, perhaps it will be easier to see why it *should* be. At the conclusion of the discussion of how subjecting human conduct to the governance of rules could be a value, I will return to the question of why it is important that Fuller's "inner morality of law" should be a value and discuss some of the restrictions such a value would impose on rule-makers in a complex society.

### 11. Why subjecting individual conduct to the governance of rules is a value

To understand why subjecting human conduct to the governance of rules might be a value requires a brief journey off the main path of the discussion. This diversion will attempt to shed some light on one of the perspectives above — Fuller's perspective — and attempt to tie his arguments in with those of another thinker, F.A. Hayek. At this point in the discussion, then, Hayek reappears. He has not totally disappeared — in fact, many of his arguments are well represented by Fuller — but he also has his own arguments to make. As we shall see, his arguments and concerns are strikingly similar to Fuller's, but they do have a different emphasis. Taken together, they provide powerful arguments for considering subjecting conduct to the governance of rules as a value.

The first point to note when considering why this would be a value is that not any form of rule will do. This chapter will make the argument that both Hayek and Fuller have only *abstract* rules of conduct in mind when they discuss governance by rules as a value. Thus, to Hayek and Fuller, the *way* in which social order is achieved is of decisive importance. It is not merely governance by rules which is important, but rather governance by a particular type of rule — abstract rules. The reason for this is that social order is not their ultimate goal — only one *form* of social order is.<sup>18</sup> This form of social order is what Hayek refers to

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<sup>18</sup> Fuller, in his article "Positivism and Fidelity to Law — a Reply to Professor Hart" (1958, 630-672), approaches this issue in a different way. There, he argues that the distinction which should be made is between order and "good" order. This is emphasizing a different point from the one in this section. Fuller's argument is, I believe, that it is the compatibility of the governance mechanism with the goals which one wants to achieve and the environment to which the mechanism is to be applied that is of decisive importance. Fuller's argument is that it is this matching of mechanisms to goals and values which Hart overlooks. "Good" order is order generated and sustained by mechanisms which are compatible with the goals and environmental restrictions of a certain type of ongoing social setting. The emphasis of this section is similar, and yet its perspective is somewhat different. It is arguing that there is an intimate connection between the degree of abstraction of the mechanism which is adopted and the type of social interactions such a mechanism can sustain. Thus, the focus is on the connection between the abstractness or concreteness of the resulting order and the type of mechanism which is capable of generating and sustaining such an order. Now, I *am* arguing that Fuller implicitly attributes "goodness" to the mechanisms associated with abstract social order (i.e. governance by abstract rules), and "badness" to the methods associated



as *spontaneous order*. He contrasts this with what he calls *organizational order*. Now, as has been pointed out in earlier chapters, there are two ways of looking at a social order. One way is to focus on the order of actions itself. Another, perhaps more useful, perspective is to concentrate on the rules which govern an order. The strategy of this chapter will be, as before, to focus on the rules which govern spontaneous orders. In Hayek's system of thought, then, a spontaneous order type of social ordering is generated by individuals being governed by *abstract* rules of conduct. This governance by abstract rules is implemented by the mechanisms described in the previous chapters.

Why, then, does Hayek hold such a form of governance to be a value? There are three main reasons. First, such a form allows individuals to adapt to environments of increasing complexity, and to generate a division of labour and knowledge of enormous diversity. Second, this form of governance enables individuals to act autonomously and allows for the growth of "individual freedom", "individual responsibility", and cultural and value diversity. Third, and through the process of abstraction as manifested in the filters of the previous chapters, this form of governance is capable of sustaining objective rules of conduct. Such objectivity leads to the possibility of objective dispute resolution and objective justice. The first two reasons will be explored in this chapter. Both of these are aspects of Hayek's claim that the *only* way to generate and preserve an abstract, *Gesellschaft*-type, social order is for individual conduct to be subject to the governance of abstract rules. The third reason forms the basis for the discussion of the principle of the Rule of Law in the chapter that follows.

It is important to be clear about what the distinction between spontaneous and organizational order implies. Much of the thesis up to now has focused on the distinction between *abstract* and *concrete* social order. "Abstract" and "concrete" in this usage refer to

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with some forms of concrete order (e.g. those in which some command and some merely obey), *insofar* as he desires *Gesellschaft*-type social relations to be sustained. Fuller's implicit argument, and the explicit theme of this chapter, is that there are restrictions on the types of governance mechanisms which are *capable* of sustaining certain forms of order, and that if this is the case it is the matching between the mechanism and the type of social order which is of decisive importance when one considers whether a mechanism is "good" or "bad". Note that in this context such attributions apply solely to the *overall* order of society, and that they are conditional both upon Fuller's belief that modern society is already to some degree constituted of abstract social relations, and upon his desire to preserve this form of social ordering. *Within* such societies (based on abstract social relations), there may be both abstract and concrete forms of order, and these are judged "good" or "bad" *insofar* as they maintain a compatibility between the type of mechanism which sustains the order and the ends and values one demands be satisfied by the mechanism. Thus, Fuller can be consistent in arguing that the application of legal mechanisms is misplaced in the "economic" sphere (Fuller 1969, 170-177), and, at the same time, also arguing that an adherence to his "inner morality of law" is a necessity if his desired form for overall society, a *Gesellschaft*-type order, is to be maintained.

the properties of the governance mechanisms of that social order. This is the same as the distinction between the mechanisms of spontaneous and organizational order. There is another distinction of some importance, and this refers to the degree of commonality between individuals in a society. The chapter uses the terms *Gesellschaft* and *Gemeinschaft* to refer to the degree of commonality present in a social order, with the latter containing more than the former.<sup>19</sup> Thus, one form of abstract social order of particular interest to this thesis is *Gesellschaft*-type social order. A *Gesellschaft*-type society is a particularly complex form of abstract society, in which a diversity of *Gemeinschaft*-type societies exist. These *Gemeinschaft*-type societies might also be governed by abstract mechanisms, and hence be abstract societies in the sense that this term is used in this thesis. On the other hand, these societies may be based on more concrete mechanisms, and hence be what Hayek terms “organizational” orders. Organizational order is a specific type of *Gemeinschaft*-type society.

It is of some importance not to confuse these two different dichotomies. The focus of this chapter is on governance mechanisms and their relationships to social order. To understand a conduct governance mechanism one must understand its relationship with its social environment, i.e. the society of which it is a part and in which it is embedded. The reason, then, for introducing a *Gesellschaft/Gemeinschaft* societal form distinction is that it is intimately related to the epistemic issues which are emphasized in this chapter and the discussions of autonomy which are closely related to these topics. *Gesellschaft* forms of society are those based on diversity — of cultures, values, etc. — and abstract commonality, while *Gemeinschaft* forms are based on less diversity and more concrete commonality. One of the central questions that this chapter seeks to address is the manner by which forms of society based on lesser degrees of concrete commonality have emerged. The answer to this question, as provided by this chapter, centres around the relationship between such societal forms and ongoing adaptation by individuals to situations of increasing complexity. Moreover, this chapter will argue that one can relate the emergence and growing importance of notions of individual autonomy to this complex inter-relationship.

The distinction between a spontaneous and an organizational order, on the other hand, is one between the different *mechanisms* used to generate and support such orders. A spontaneous order is a social order based on mechanisms generating and facilitating conduct

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<sup>19</sup> I am presuming the reader is familiar with this distinction, characterized somewhat differently, in Kamenka and Tay (1971; 1975).

governance by abstract rules. An organizational order, on the other hand, has no such connection with abstraction or abstract rules, and is associated with much more particularistic and concrete forms of governance. Now, while this can be a useful distinction which will be referred to occasionally, it is not the chapter's primary focus. Rather, the contrasts between these different forms of governance will be examined in much greater detail in the chapters which follow. This chapter, then, tends to focus on a single form of conduct governance — governance by abstract rules — and stresses the implications which follow from the operation of this type of governance in increasingly complex environments.

The reader must be careful not to conflate the abstract/concrete, *Gesellschaft/Gemeinschaft* distinctions made above. It would, for instance, be incorrect to argue that societies containing large degrees of concrete commonality cannot be based on following abstract rules of conduct. Indeed they can — such societies might very well be governed primarily by abstract rules of conduct.<sup>20</sup> That this could not be the case is not an argument put forward by this chapter or this work.<sup>21</sup> Rather, the argument is that abstract forms of society are associated with mechanisms based on abstraction, and further, that it could not be the case that an *abstract* society could be governed *solely* by concrete rules of conduct.

I will end this discussion with a brief summary of the issues to be addressed in the remainder of this chapter. The main goal is to explain why conduct governance mechanisms based on abstract rules are important. There are three aspects to this. First, abstract rules are adaptations to complexity. This is the epistemic aspect of the chapter. Second, abstract rules allow individuals to follow their own goals. Call this the autonomy argument. Third, abstract rules are important because of their potential objectivity. This forms the impartiality facet of the chapter. The first two perspectives tend to be emphasized in this chapter, while the impartiality claim is the centre of attention in the chapter which follows. In explaining why governance by abstract rules is of importance, I resort to two fundamental distinctions. First, there is a distinction between the degree of commonality present in a social group.

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<sup>20</sup> Though these rules would be relatively concrete in relation to the rules governing the *Gesellschaft* societies which contain these *Gemeinschaften* as members. One important point to note: if the individuals of a *Gemeinschaft*-type society evolve increasingly abstract rules of conduct, this implies both that these rules will refer to wider and wider sets of individuals, and also that these rules will have a less substantive content — and thus will be transitioning towards the level of abstraction of the rules governing the *Gesellschaft*-type societies of which they are members.

<sup>21</sup> Furthermore, none of the arguments of this thesis undermine the fundamental importance of *Gemeinschaft* societies.

This is the *Gesellschaft/Gemeinschaft* dichotomy. Second, there is a distinction between the type of mechanisms which are associated with particular types of societies. This thesis refers to societies governed by abstract mechanisms as abstract societies, and to societies governed by concrete mechanisms as concrete societies.

## 12. Why individuals are governed by abstract rules: the argument from complexity, part I

Hayek is arguing that in a complex society one would have to resort to abstract rules in order to orient oneself in social interactions. He is also arguing that the existence of a complex society is somehow dependent on individuals following these same abstract rules. This is not merely a matter of definition but rather one of mutual dependency. This being the case, it might be a fruitful line of investigation to ask why individuals in a complex society would *need* to follow abstract rules. If there is a need to follow abstract rules, one might then legitimately inquire into how this is related to the resultant form of society which emerges from individuals orienting their behaviour using abstract rules. The plan of attack, then, will be to consider why individuals would need to resort to abstract rules.

Before pressing on, though, one challenge to this line of argument should be addressed. One way to object to this entire strand of thought would be to argue that individuals *always* follow abstract rules of conduct, regardless of the type of society in which they find themselves, and hence it is spurious to claim that abstract rules of conduct are *necessarily* related to a *Gesellschaft*-type social system. This objection is a valid one insofar as it argues that individuals in societies with large degrees of commonality could *also* be governed by relatively<sup>22</sup> abstract rules of conduct under the mechanisms outlined in the previous chapters. This is unobjectionable, but it is also not at issue. The claim of this chapter is that *if* an abstract, *Gesellschaft*-type society is desired, then social governance mechanisms would have to be based on abstract rules which pass through the filters manifested by the mechanisms outlined in the previous chapters. The argument, then, is that governance by abstract rules is a *necessary* condition for the existence of a *Gesellschaft*-type society, but not that it is also a sufficient condition. The argument is not, then, that it is inconceivable

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<sup>22</sup> Relative to the degree of concreteness of that society.



that *Gemeinschaft* forms of society could be governed by abstract rules of conduct, but rather that it is impossible for abstract forms of society to *not* be so governed.

The objection that individuals *always* follow abstract rules of conduct is, I think, correct in claiming that individuals inevitably follow *some* abstract rules of conduct in their attempts to orient themselves in social settings. This much seems unquestionable.<sup>23</sup> The question is, however, *why* they need to do so, the *relative* predominance of abstract versus concrete rules in guiding social conduct in different types of environments, and hence the relationship between the abstractness or concreteness of rules of conduct and the environmental complexity — and societal type — that confronts an individual. This is what our investigation will attempt to uncover.

It is possible, then, to imagine a society in which individuals relied primarily on relatively concrete rules of conduct to guide their conduct and social interactions. To do this is to imagine a society in which individuals' conduct would be heavily dependent on space-time particulars (i.e. conduct would be based upon an individual's particular context and circumstances). In this scenario, an individual's conduct would, in general, be *relatively* more dependent upon space-time particulars than one would under a regime of more abstract rules. Abstract rules of conduct, on the other hand, would be less reactive to particular contexts, but more reactive to general aspects which endure over time and across space. The move to abstract rules of conduct in a sense filters out particularity, and makes one responsive to *types* (classes) of stimuli, as opposed to particular stimuli.

If this is correct, what does it imply? Consider how individuals following the two different rule types would adapt to new environments. Both types of individuals would be guided by particulars and abstractions, but to differing degrees. If the new environment were one in which many of the space-time particulars were unfamiliar, an individual following concrete rules of conduct would have more difficulty orienting themselves and reacting to these particulars. An individual oriented by abstract rules, on the other hand, would be less dependent on particular spaces and times and hence able to orient themselves more effectively.<sup>24</sup> This is, essentially, Hayek's argument for the importance of abstraction: that as environments change, abstract rules of conduct are more effective tools for orienting

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<sup>23</sup> See, for example, Huizinga's *Homo Ludens* (1950), which examines the relationship between rules and play.

<sup>24</sup> Note that this argument does *not* imply that there is no place for more concrete rules of conduct. Concrete rules of conduct will always have an essential role to play in guiding individual conduct in environments which contain familiar concretes, and in environments over which individuals have space-time specific knowledge.



oneself than are context-specific rules which condition on particular chunks of space and time.<sup>25</sup>

### 13. On the “sub-optimality” of using rules

This line of argument claims that abstract rules are an effective decision-making adaptation. Sometimes, however, it is argued that the use of rules is a “second-best” solution to problem solving. A typical argument, presented with admirable clarity, can be found in Frederick Schauer’s *Playing by the Rules* (1991, 100-102). Schauer claims that it is *necessarily* the case that rule-based reasoning is “sub-optimal”. This he deduces on “logical” grounds, for he claims that it will *always* be better to use the justification for the rule than the rule itself. The argument, simply put, is that exceptions to a rule constitute the reason for its sub-optimality, i.e. one can always do better than a rule by implementing the rule’s justification on a case-by-case basis (hence, eliminating exceptions and hence improving on the results produced by following a rule).

This is an appealing argument. It is nevertheless incorrect, for it implicitly imports contingency into an argument of so-called “logical necessity”. This contingency enters in the form of an implicit assumption that the justifications of a rule are *known*. The argument that *if* a rule’s justifications are known, then it will be “sub-optimal” to follow rules would be correct, but this is obviously a contingent argument, dependent upon the knowledge of the justifications for particular rules. And, if the justifications for a rule are *not* known, what is to be made of the claim that it is always better to impose the justifications directly? How could one impose justifications which one does not know?

This argument leads to a more general point. Schauer’s argument implicitly assumes that there is a difference between judgments based on “all the information” and judgments based on limited sets of information. He also seems to imply that one can never produce worse results by considering all of the available knowledge and information. Both of these beliefs are incorrect.

Is there a difference between judgment based on “all the information” and judgment based on rules which limit information? No. *All* judgment is based on closures, on excluding

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<sup>25</sup> Hayek makes this argument in many of his works. Probably the most effective of these are in *The Constitution of Liberty* (Hayek 1960, 148-161) and the second volume of *Law, Legislation and Liberty* (Hayek 1976, 1-30).

some things from consideration while including others. The argument that case-by-case judgment is always better than rule-based judgment simply presupposes that the momentary, individual-specific closures of an individual are somehow better than those embedded in rules. But why would this necessarily be the case? Schauer seems to be assuming that more (knowledge) is always better. But need this be the case? Are there not some forms of knowledge which, if excluded, would lead to a better implementation of one's goals or values? And what type of knowledge might this be?

To answer this question, consider the following: Schauer's argument completely overlooks the fundamental struggle between judgment based on momentary goals and judgment based on long-term goals and values. The theory of mind upon which this thesis is based argues that there is a continual struggle in every mind between the short- and longer-term. Long-term goals and values exert their force continually, but they can be overwhelmed by short-term goals based on short-term judgment. Schauer simply ignores the fact that, *relatively speaking*, in situations of conflict between the short- and long-term, a more complete consideration of the concrete circumstances of the moment implies a less complete consideration of long-term interests.<sup>26</sup> Rules counter-balance this. Rules reduce short-term judgment and short-term weighting of situations, and hence are *manifestations* of long-term priorities. Schauer, then, ignores the consequences for the rank-ordering of one's priorities that a shift towards momentary judgment implies. Rules are one way of combating the bias towards the present imposed by judgments based on momentary circumstances and the heightened intensity which particular circumstances seemingly lend to some goals and not to others. This heightened importance flows from simply ignoring — closing off to consideration — long-term effects which are not recognized (and perhaps not recognizable) in the short-term. This is one reason why individuals resort to rules.

Now consider rules of social conduct. These are resorted to because the goals flowing from concrete circumstances generate conflicts between the concrete goals of different individuals, and the possibility of an objective solution to these concrete disagreements arises when we resort to general rules which deal with these conflicts *in abstract*, that is, by excluding certain features of the concrete reality by using general rules which are based on enduring, long-term values. The idea that "as a rule we will do X in situation Y" is one way

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<sup>26</sup> Assuming a fixed time interval over which such a consideration takes place, and assuming that "interests" is taken to include both ultimate goals and values.

of *manifesting* long-term values and allowing these to dominate competing short-term, situation-dependent goals.

Case-by-case judgment, then, is not necessarily a superior method of judgment to one based on rules. Instead, each method claims that certain forms of knowledge should be given priority, and that their method of judgment is the best method of achieving certain types of goals. Case-by-case judgment emphasizes person-specific, momentary judgment. This way of reasoning gives greatest weight to momentary, individual-specific goals. Rule-based judgment, on the other hand, emphasizes supra-individual knowledge based on longer-term considerations, or values which might not be consciously known to the individual.<sup>27</sup>

To summarize: the general argument that one can always do better by adopting a case-by-case method of judgment is flawed in a fundamental way. Its implicit presupposition is that an individual will always achieve better results if they implement *their* momentary judgments of what best manifests their ultimate goals and values. The difficulty is that such a view presupposes away any *conflict* between the short- and long-term — and yet this is precisely when it becomes obvious that one's momentary judgments may not reflect one's long-term interests. Some individuals resort to rules precisely because they realize that their momentary judgment of the best way to achieve what they want is *not* as effective a strategy as would be one based on following rules. Put simply, rules can be useful tools for achieving one's long-term interests *because* they do not consider all of the available information. That is, *not* considering all the available information can produce better results than would a more complete consideration. But how could not using all the available information lead to the best possible result? How could this be? The answer lies in revealing a misconception: "all" the available information is *never* simply "given" to an individual making a judgment. The idea that "all" the information can be used is an illusion. Judgment always requires an interpretation of what shall be the "given" information. Such interpretation is based on closures which necessarily "select" which information will impact upon a judgment. Such closures can be based on person-specific or person-independent criteria. For the former to produce "better" choices than the latter, one would have to show (a) that momentary individual-specific closures are necessarily superior to supra-individual rule-based closures

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<sup>27</sup> This is, I think, the essential idea behind Hayek's numerous discussions of the difference between judgment based on "principle" versus those based on case-by-case "expediency" (Hayek 1948, 1-32; 1973, 55-71; 1976, 1-30).

at discerning what is relevant and important to the achievement of one's goals and (b) that individuals know the ultimate justifications for the rules they follow. If they do not, and if they are governed by some rules without necessarily knowing the justification for doing so, then individuals would in some sense be treating these rules as *values*, i.e. they would be treating them as values and not merely as the means towards other ultimate ends or values. This might be, then, one reason for Fuller's and Hayek's insistence that some rules *should* be treated as values, and not merely as the means to achieve greater goals.

#### 14. The relationship between abstract rules, *Gesellschaft*-type societies, and complexity

The discussion above has argued that if there are limitations on knowledge, then rules might in some cases be an effective orientation mechanism. This applies with even greater force as individuals' environments become more complex, as it may be increasingly difficult to ascertain the justifications for particular rules. Rules — and in particular, *abstract* rules — might achieve an increasing importance in complex environments. Is there, then, a fundamental relationship between abstract rules of conduct and orienting oneself in an abstract, *Gesellschaft*-type society? The Hayekian argument is that there is. The argument is that only by obeying abstract rules of conduct can individuals orient themselves in situations of increasing complexity. Complexity of a fundamental form arises from the differences in environments which exist at different points in time and space. *Gesellschaft*-type societies — a new type of complexity — arose from the interaction of different types of individuals familiar with different space-time environments. Interaction was made possible by the adoption of rules of conduct which were effective in guiding conduct across a range of different and diverse environments. These rules were abstract in that they guided conduct over the abstract similarities of these environments.

The Hayekian claim, then, is that *Gesellschaft*-type societies emerged through the interaction of individuals who had grown up in, and were adapted to, different environments. These forms of societies were sustained by mechanisms which facilitated the orientation of individuals in their *decentralized* interactions. Why decentralized? Because individuals live in particular space-time environments, because their knowledge is there too, and because an individual's effective orientation in their environment requires that they use knowledge which is specific to them, to which they have, in some sense, a privileged

access.<sup>28</sup> The fundamental problem facing centralized forms of governance is the difficulty of utilizing this person-specific knowledge. If, therefore, one is considering an environment in which such knowledge is important to individual orientation,<sup>29</sup> such forms of governance may find it difficult to orient individuals as effectively as they could orient themselves.

The Hayekian argument, then, is that decentralized action by individuals underlies social diversity and complexity (which are in a sense the defining characteristics of a *Gesellschaft*-type society) and that it is only through the following of abstract rules of conduct that decentralized individual action is possible in such environments. Moreover, I would argue that not only is conduct governance by abstract rules a necessary condition for individuals to be able to act with the regularity required to sustain a *Gesellschaft*-type society, but it is also a pre-condition for the possibility of having conflicts resolved in an objective manner (a theme that will be examined in some detail in the following chapter). Thus, governance by abstract rules provides the foundations for the growth of increasing degrees of complexity and diversity through decentralized individual adaptation, as well as the basis for social integration through the potentially objective resolution of disputes.

#### **15. The relationship between “individual liberty”, “individual responsibility” and abstract rules of conduct**

The second reason for holding that governance by abstract rules is a value is that it is intimately related to the notions of “individual liberty” and “individual responsibility”. The argument which follows relies to a large extent on the arguments of Hayek. The reason for this is that his concerns have to some extent been more theoretical than Fuller’s, and his focus has tended to be upon general social analysis rather than upon more specific institutional details. This is not to say that the discussion that follows is not supportive of Fuller’s view, for I believe that it is, but rather to point out that Fuller did not devote the bulk of his energies to such an inquiry. In any case, the goal of this chapter is to formulate a new vision of law based upon, but not merely re-arranging, the insights of these two thinkers. With that goal in mind, then, I return to the main discussion and restate the

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<sup>28</sup> This does not imply, of course, that such access will be infallible, or that the truth of an individual’s beliefs are not contestable.

<sup>29</sup> This is certainly not to be taken as being true in *all* environments. Indeed, in certain contexts there are substantial benefits to be gained by centralization.



question it seeks to address: why might subjecting human conduct to the governance of rules be a value?

One primary reason why this type of governance is thought to be a value to Hayek<sup>30</sup> is that he claims that subjecting human conduct to the governance of abstract rules is a necessary condition for what might be called the “fullest flowering” of moral<sup>31</sup> virtues. But of what does this “fullest flowering” consist? Surely Hayek is not arguing that some societies have no moral notions or that in some types of societies moral action and judgment would be impossible. But what, then, *is* Hayek arguing?

There are a variety of issues at play here, and Hayek weaves a complex, interconnected web of arguments. But what are these arguments? And what lies at their core? To make this intelligible, I must first state three claims which Hayek asserts at various points in his writings, and then follow these with one implicit but essential presupposition of these arguments. First, he argues that a necessary connection exists between “individual liberty” and “individual responsibility”. To Hayek, “[l]iberty and responsibility are inseparable” (Hayek 1960, 71) since “the sphere of individual freedom is also the sphere of individual responsibility” (Hayek 1960, 79). Second, he claims that “individual liberty”<sup>32</sup> is a prerequisite for the existence of many other moral virtues.<sup>33</sup> Third, he states that a necessary condition for “individual liberty” and “individual responsibility” is the governance of human conduct by abstract rules.

One element of these claims might be unfamiliar. This is the idea of a “sphere of conduct”. One necessary condition for the existence of “individual liberty” and “individual responsibility” is the existence of a sphere of actions which are attributed to an individual. That is, there must be a sphere of conduct which is attributed to the individual and not to any other. As Hayek puts it, “freedom...presupposes that the individual has some assured private sphere, that there is some set of circumstances in [their] environment with which others cannot interfere” (Hayek 1960, 13). Note that such a sphere separates the individual

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<sup>30</sup> To some degree, Fuller makes this argument as well. See, for example, his statements in *The Morality of Law* (1969, 162-167, 181-186).

<sup>31</sup> It should be noted at the outset of this discussion that Hayek and Fuller are using the term “morality” in its specifically modern sense, i.e. in referring to conduct which is attributed to acting individuals. This is, of course, not the only notion of morality to which one might resort, as both Nietzsche, in both *Beyond Good and Evil* (1966) and *On the Genealogy of Morals* (1968b), and MacIntyre’s *A Short History of Ethics* (1966), make clear.

<sup>32</sup> In the sense of being “free from coercion by other individuals”. This is a crucial qualification. See Hayek’s chapter in *The Constitution of Liberty* (1960, 11-21) for his discussion of this point.

<sup>33</sup> See, for example, the claim that “[m]oral esteem would be meaningless without [individual] freedom” (Hayek 1960, 79) and the statement that “[individual] liberty is not merely one particular value but...[rather] the source and [pre-]condition of most moral values (Hayek 1960, 6).

from the environment in the sense that the environment is *defined* by that which is not attributed to the individual. Put another way, a necessary condition for the existence of “individual liberty” and “individual responsibility” is the existence of the notion of an individual. This in turn requires that a separation is made between the individual and their environment, and it is from such a separation that the concept of a “sphere of individual conduct” emerges.<sup>34</sup>

The question, then, is *how* this sphere is delineated. This brings us back to abstract rules of conduct, for Hayek claims that it is only through a resort to abstract rules that such a sphere can be delineated. Why would this be the case? Why must mechanisms embedding abstract rules be used to specify the boundary?

There is one essential element at play here. It is important to keep in mind that Hayek’s focus is on spheres of conduct which are the *same* for all. Thus, his argument does not apply to more concrete forms which are context- or subgroup-specific. Hayek’s concern is with an individual sphere of conduct which is the same for everyone capable of conforming to it, and does not apply to the concept’s more concrete forms. One implication of this, which will be examined in later paragraphs, is that Hayek’s argument applies primarily to *negative* conceptions of such a sphere (in the sense of being delineated by prohibitions). For the moment, however, it is sufficient to note that restricting the focus of attention to universal forms of the individual sphere would imply that individual-specific aspects would be stripped away from the rules delineating this sphere through the operation of the mechanisms which support governance by abstract rules. It is this stripping away of particularity which provides the basis for asserting that these rules are *abstract* (for such a filtering in a sense defines what the process of abstraction does). Moreover, it also explains why the individual sphere is defined by abstract *rules*, in that it is only if modes of conduct persist across a wide range of varying particular circumstances that they can be termed rules of conduct in the performative sense of that term. It is the move to the realm of the abstract, then, that provides the foundation upon which Hayek builds his argument.

There is one more implication of Hayek’s focus which is of some importance. Note that it is the move to the abstract which supports the (potential) *objectivity* of the rules of conduct which delineate the individual’s sphere. One upshot of a move to the abstract is that the use of individual-specific criteria in establishing this sphere would be ruled out, for

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<sup>34</sup> I will speculate as to *why* such a sphere arose in a later section of this chapter.

otherwise *all* individuals would not be capable of being governed by the same set of rules. This applies with added force in the complexity of a *Gesellschaft*-type society where the difficulties of orienting oneself are especially difficult. This consideration implies that the rules defining the individual's sphere must be known, at least in a performative sense, to the individuals that obey them and hence that they are *commonly-shared* (i.e. objective to the individuals sharing the rules).

Hayek's argument is, then, that the only form of governance mechanism which is capable of supporting both "individual liberty and responsibility" and the social life of an abstract, complex, society, is one based on *objective, abstract* rules of conduct. Moreover, it is of some importance to note that in the context of a *Gesellschaft*-type society, it is only by being surrounded by regular conduct (engendered by other individuals following rules) and by being oriented by abstract rules, that individuals can act under their *own* judgment and ensure that the boundary between the individuals and their environments (which, it is important to keep in mind, includes other individuals) is preserved.

But what, then, lies at the core of these, and previous, assertions? In the final analysis, Hayek's argument seems to be based on the idea that being governed by abstract rules of conduct is a *necessary condition* for being free. In other words, if we are governed by abstract rules of conduct, we are free. The argument, then, is "that when we obey...general abstract rules laid down irrespective of their application to us, we are not subject to another [person's] will and are therefore free" (Hayek 1960, 153). This is, on the face of it, a rather bizarre argument. What could Hayek mean by it? And how does he come to this view?

Before turning to these questions, we must first turn to a qualification which must be added to these claims, this being that Hayek is implicitly referring to notions of "individual freedom and responsibility" which are based on an individual sphere which is the same for all. As was pointed out above, one implication of this is that Hayek's notions of "individual freedom and responsibility" would be restricted to those forms which were (potentially) objective.<sup>35</sup> This strand of his argument is often only implicit, but it has some important consequences. Consider its implication for notions of freedom and responsibility. Earlier chapters have argued that the mechanisms which support the generation of rules tend to produce objective rules of conduct which are, for the most part, abstract and predominantly negative. If one restricts attention to notions of "individual freedom and responsibility"

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<sup>35</sup> When mapping this onto obligations, this implies that his notion refers to commonly shared obligations which are owed *by* all *to* all others.

which are based on objective rules of conduct, this implies that these notions will also be abstract and, in large part, negative. Hayek's argument *emphasizes* negative conceptions because his concern is with objective notions of freedom and responsibility. But it should be stated, in opposition to this, that it would be a mistake to argue that there are *no* objective positive minimal obligations underlying social life, or that there are no intelligible notions of "individual freedom and responsibility" which can be *based*, at least in part, upon such positive obligations. The minimal conditions for social life are both conduct-requiring and prohibitive, and it would be a serious error to assume that notions of freedom (and responsibility) which are based solely on prohibitive rules of conduct are independent of the continual fulfilment of positive obligations,<sup>36</sup> or are themselves sufficient to ensure that a social life exists and is sustained. If Hayek does fall into the trap of arguing that "freedom" is a solely negative concept (i.e. freedom is intelligible only insofar as it refers to what one is free *from*),<sup>37</sup> and that such freedom has no dependence upon certain minimal pre-conditions being met, some of which are undoubtedly positive, then his argument should be rejected. This is not to say that there are not some rather serious conceptual difficulties with notions of freedom which are based primarily on positive rules of conduct (and some of these difficulties will be addressed in later paragraphs), but rather to argue that (a) there is an intimate and ongoing interplay between negative and positive obligations *underlying* notions of freedom, and that (b) the difficulties one might encounter in basing a notion of freedom primarily on positive rules does not support the view that minimal positive obligations have no role to play as pre-conditions for all notions of freedom. The argument of this thesis is a different one, in that it merely points out that the resort to certain types of governance mechanisms has the consequence of imposing restrictions upon the type of positive obligations which can support the notions of "individual freedom and responsibility". It does not, then, support those views which call for the outright rejection of positive notions of freedom and responsibility.

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<sup>36</sup> Such as the positive obligations which exists between parent and child, for example.

<sup>37</sup> Hayek does seem to make this argument in *The Constitution of Liberty* (1960, 11-21), and it is possible to make a case that he would consider the pre-conditions for freedom to be a "separate" topic from the question of whether one was free. See, for example, his assertions that "[w]hether [one] is free or not does not depend on the range of choice" and "the range of physical possibilities from which a person can choose at a given moment has no direct relevance to freedom" (Hayek 1960, 12-13). The problem with each of these claims is that they implicitly assume that the pre-conditions for *choice* have been satisfied (i.e. that there *are* alternatives to choose between, and that one is capable of making a choice) and hence are subject to the same objections as are raised in the main text above.



With this qualification in hand, let us turn then to a consideration of Hayek's notion of freedom. Why, then, does Hayek claim that conduct governance by abstract rules is a necessary condition for being free? The answer to this is revealing. As was pointed out above, Hayek bases his equation on one essential pre-condition which, he argues, a definition of freedom must satisfy. To Hayek, freedom must be freedom for *everyone*. This condition implies that Hayek's notion of freedom must refer to actions which everyone can perform *or* to actions which everyone can be free *from*. This is an important distinction, as it allows for an objective *performative* notion of freedom (i.e. one that is shared by everyone in the sense that they can act under it). Now, if freedom is to be based on objective rules, then this implies that there must be mechanisms for generating such objective rules of conduct. This is where the mechanisms described in previous chapters come to the fore, and it is from the discussions of the previous chapter that we can imply that these rules will be based on following predominantly negative abstract rules of conduct. The negativity condition is of special importance, for it implies that freedom must be defined negatively, i.e. in terms of what others *cannot* do to you.

Why would this be the case? Consider my freedom to perform some act. Hayek's pre-condition imposes a filter over the notion of freedom. "What can *I* do?" is transformed by Hayek's filter into the question "what can I do that everyone else can do?". This *symmetry* condition restricts the scope of a notion of freedom. Freedom, on this view, is *always* a system-quality (a social quality), and this implies that for Hayek it is uninformative to ask what *I* am free to do in isolation from others.

Assume, for the moment, that this filter is passed and a set of acts emerge which I am free to perform. Then assume a *conflict* exists between two individuals performing these acts, i.e. it is impossible for me to perform one of these acts and for you, at the same time, to perform your act.<sup>38</sup> How is this resolved? How can we both be "free" to perform these acts when it is impossible for one of us to perform it? If everyone cannot perform their act, is this not a violation of the symmetry condition?

Does this represent an insuperable difficulty for *any* concept of freedom? No. The source of this difficulty flows from an implicit assumption underlying this imagined scenario. The assumption seems to be that "freedom" is defined in terms of acts which one can perform rather than in terms of acts which no one is allowed to do to you. Once this is realized, we

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<sup>38</sup> As an example, consider one's freedom to sit in a particular chair if other individuals have the same desire at the same time.



can run through the scenario again from a different perspective. On this way of viewing the matter, “what am I free to do?” is not the relevant question. Rather, the question of interest is “what are others not allowed to do to me?” or “what am I free from?”.

Will difficulties emerge under this sort of redefinition? Could it be that *all* individuals could be free from the same sorts of conduct and, at the same time, for there to be no conflict between these sets? Yes, this can be the case, but it would depend critically upon the properties of the actions that one is free from. These *cannot* be states that one finds oneself in, for this would imply an obligation on another to change your condition and this would in turn imply the existence of a non-symmetric rule which does not apply to everyone in the same way. One must, therefore, be free from certain forms of conduct (as opposed to freedom from states of affairs) which others *can* and *should* not perform, i.e. they must be capable of not performing it and there must be an obligation upon them not to perform it.

Note the intimate connection with the earlier discussion which argued that it would be a mistake to jettison the fundamentally important role played by positive notions of freedom and obligation. The argument about the difficulties surrounding a positive notion of freedom implicitly presupposes that the performance of actions is a *possibility*, and hence implicitly assumes that the minimal conditions for action have *already* been satisfied. However, if this were not the case, and some individuals were not, on their own, able to meet these minimal conditions, then this argument would be *inapplicable*. The important point, I think, is that the satisfaction of certain minimal conditions is presupposed by any notion of freedom, and that if these conditions are not in fact satisfied, it makes very little sense to talk about whether one was, or was not, free to, “in principle”, perform some action. In other words, when one is considering arguments with implications for conduct governance, there must be a match between the potential and the actual such that certain minimal conditions are met, for otherwise, there would be no individual to guide and no conduct to govern.

If one takes it as a given that certain minimal conditions (some of which are no doubt positive) must be, and have been, met, what can one then say of Hayek’s argument against notions of positive freedom? Consider the following: if I were to complain that my freedom was worthless because there were certain acts which in principle I was free to perform but in practice I could not, Hayek could argue that I misunderstood the idea of “freedom”. The error underlying my complaint stems from the implicit assumption that freedom is positive and refers to acts that I am free to perform. This assumption is an erroneous one. If both you

and I are free to perform certain acts and a *conflict* emerges, how is this to be resolved?<sup>39</sup> Clearly, one of us is not “free” in the sense of being able to perform the desired act. This difficulty, however, stems directly from the assumption that freedom is positive. Freedom defined in positive terms leads directly to the notion of *trade-offs* between *freedoms*. My freedom to act can at the same time be your “unfreedom”. My freedom to not be in a particular state can be your obligation to extricate me from this state. One person’s increase in their ability to act can imply another person’s reduction in their ability to act. All of this stems from adopting a positive definition of freedom, based on the idea that to be free implies the existence of certain acts which I can perform. But this, I would argue, is the wrong way to view freedom, especially if one is interested in providing a workable definition which can guide conduct autonomously and objectively in situations of increasing social complexity. The Hayekian view is that a better way to view the notion of freedom would be to answer the question “but what am I free to do?” with the response “you are free to do anything that does not violate the *negative* rules which govern other — and your own — individual spheres”.

To summarize, then: the Hayekian argument is that the only notion of freedom which is the same for all and which is based on objective rules of conduct compatible with the mechanisms of the previous chapters (which generate objective rules of conduct) is one based on *negative, abstract* rules of conduct which delimit individual freedom by determining what others may *not* do to others. This is a notion of “individual” freedom which is necessarily *in* society, and it is based on negative abstract rules “applicable to everybody”.

Three qualifications to this argument should be made before closing this discussion. First, and to reiterate the point which is emphasized above, Hayek’s argument presupposes that certain minimal conditions for action have *already* been satisfied. If these have not been satisfied, his conclusions regarding the nature of freedom are rendered suspect. Second, this argument does not specify the *content* of the individual sphere which constitutes the

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<sup>39</sup> Clearly, such a positive definition of freedom presupposes some mechanism which resolves such disputes. This is not problematic. What *is* problematic is that such a definition implies that the freedom of some directly implies the “unfreedom” of others. This is a notion of freedom which, *if conflicts emerge*, cannot be applied in the same way to everyone. In other words, it is a definition which cannot be *universalized* to produce the same rule which everyone could obey in particular situations. It is a definition which calls for the resolution of freedom-conflicts (which its own definition engenders) by a mechanism which is capable of weighing one person’s freedom to act against another’s. This notion of freedom implicitly presupposes *trade-offs* between freedoms, and implicitly builds in *unfreedom* at its core.

boundary between individuals. It merely states *minimal* conditions for the establishment of this sphere. It does not state sufficient conditions. Third, this line of argument refers solely to social freedom — the same freedom which is shared by all. In particular, it is not concerned with more concrete notions of freedom which might be applicable only within particular groups or solely in particular circumstances.

With all of these qualifications in mind, then, return to Hayek's three assertions. Why is "individual liberty" necessarily connected to "individual responsibility"? Because, Hayek argues, they are two sides of the same coin. Consider "liberty" (i.e. "freedom"). What am I free to do? Hayek's answer: anything that does not violate the rules which govern the individual's sphere. For what actions am I responsible / will I be held responsible / are my responsibility / am I obliged to perform or *not* to perform? Hayek's answer: all those that you *can* and *should* control. And how are these defined? Which actions can I and should I control? Hayek's answer: those actions which will violate the individual sphere of another.

Hayek's other two assertions are also readily intelligible. Governance by abstract rules is a necessary condition for "individual liberty" and "individual responsibility" because it is the only way such concepts can be given a meaning which is objective and hence amenable to individuals guiding their own conduct in similar ways in social situations. "Individual liberty" is a necessary pre-condition for other moral virtues because as "individual liberty" is limited, so is the degree of applicability of morality based judgments. In this sense, moral merit, praise and blame, and other moral concepts lose their applicability as judgment criteria over those sectors of that society that do not enjoy "individual liberty". Finally, note the connection between freedom and minimal moral systems: the latter are, in their objective sense, predominantly defined by rules which set out *in negative form* the actions one is free to perform (i.e. in the sense of being *free from the responsibility to refrain from performing them*).<sup>40</sup>

The conclusions flowing from Hayek's three assertions are thus as follows. First, to Hayek, the spheres defining "individual liberty" and "individual responsibility" are identical. Second, these spheres are defined using abstract rules of conduct *and* this is the *only* method which could do so and at the same time retain an objective definition which

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<sup>40</sup> Once again, it is important to remind the reader that Hayek is implicitly referring to universal forms of responsibility, i.e. to those forms which are shared by *all*, and not to more limited forms. Hayek's focus is upon the commonly shared responsibilities of all individuals, and it is this restricted interest which leads him to claim that one is responsible only for those acts which violate the individual spheres of others.

allows individuals to guide their *own* conduct in the same way. Third, “individual liberty” is a pre-condition for other moral virtues because it is through the assignment of individual responsibility, which is in turn based on the idea of “individual liberty”, that morality comes into play as a judgment criterion. Fourth, and finally, social order based on governance by predominantly negative abstract rules of conduct is a value because it is under this governance mechanism that *as many individuals as possible* can have *objective* forms of “individual liberty” and “individual responsibility”.

This has an interesting implication. If these conclusions are correct, then this implies that criticisms of Hayek which claim that he bases his arguments for “individual liberty” on other values<sup>41</sup> are, in a sense, wide of the mark, for Hayek is arguing that “individual liberty” is a necessary *pre-condition* for the growth of values, moral and otherwise. In this sense, Hayek does not ground his argument for “individual liberty” on *other* values, moral or otherwise, because his theory is in part based on insights into *how* morality and values are themselves generated and sustained. In a Hayekian framework, morality does not exist in a vacuum. Nor do values. They are not something which exist independent of the world, or “above” the world, but rather are a product of interaction and evolution *within* the world. Hayek argues that subjecting conduct to the governance of rules is a value because such a mechanism allows for the “fullest flowering” of moral virtues. This “fullest flowering” refers to the possibility of greater and greater numbers of *particular individuals* basing their action and judgments on moral considerations and, in essence, putting their morality into effect. The Hayekian argument is that if conduct governance is not based on predominantly negative abstract rules of conduct, then the possibility of moral action, moral judgment and moral merit extending to wider and wider classes of individuals also disappears. This shrinking of the moral sphere to increasingly restricted groups of individuals is, Hayek argues, an inevitable outcome of rejecting a governance mechanism which makes moral action an attainable possibility for wider and wider segments of the population. In the final analysis, Hayek’s argument is that for “individual liberty” and “responsibility” to achieve their widest possible impact in a society (and for larger and larger numbers of individuals to be “responsible” and have “liberty”), individual conduct must be subject to the governance of abstract rules. To Hayek, then, “individual liberty”, “individual responsibility” and moral judgment are inseparably intertwined.

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<sup>41</sup> See, for example, the criticisms of Ogus (1989, 403-406).



## 16. Two objections to the connection between governance by abstract rules and moral virtue

It is important to clearly understand the argument that is being made by the discussion above. One misunderstanding of this argument can be revealed by examining an objection to the idea of a necessary relationship between governance by abstract rules and moral virtue. Consider, for the moment, the argument that there is no necessary relationship between societies with large degrees of commonality and ones in which conduct is governed by relatively concrete rules. In Hayek's terminology, this objection claims that there is no necessary relationship between *Gemeinschaft*-type societies and organizational forms of order. This is, I think, quite correct — there is *no* necessary relationship *so long as* a *Gemeinschaft*-type society is grounded upon the mechanisms supporting governance by abstract rules and is *limited* in the diversity that it attempts to govern. There is nothing in the theory developed in this chapter which implies that *Gemeinschaft*-type societies will have less freedom or responsibility than would a *Gesellschaft*-type society so long as (a) these societies use the mechanisms outlined in the previous chapters to generate and filter rules and (b) it is understood that the requirements of commonality presupposed by a *Gemeinschaft*-type society will probably be undermined by spatial expansion, temporal distancing, and, more generally, interaction with that which is different and diverse.<sup>42</sup> The underlying ontological and evolutionary premises underlying this thesis (that space-time differs at different points, and that organisms adapt to these differences and hence become diverse) implies that existence at different points in space and time will result in differences — in biological form, in culture, in knowledge, etc.. It is the growth of diversity which poses a problem for particular types of concrete social mechanisms. If a *Gemeinschaft*-type society were grounded upon social mechanisms capable of generating rules of conduct which were able to deal with the increases in diversity and complexity, there would probably be a gradual transition from a *Gemeinschaft* to a *Gesellschaft*-type social form. If, however, the attempt is made to maintain commonality in the face of growing diversity by an abandonment of these mechanisms, or if these mechanisms were never in place in the first place, this can lead to the imposition of one group's commonality onto another group's

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<sup>42</sup> One of the fascinating aspects of the work of Harold Innes was his ground breaking analysis of the development of various mechanisms of communication and their implications for social interaction and social structure. See, in particular, *Empire and Communications* (1950) and some of his essays which elaborate on, and provide support for, this theme in *The Bias of Communication* (1951).



differences. Thus, because some forms of mechanisms supporting a *Gemeinschaft*-type society have difficulty dealing with emergent diversity, these mechanisms can lead to the *imposition* of the commonality of various dominant groups onto other, less dominant groups who do not share the same commonality.

This brings us to a more general point, an implicit presupposition which Hayek rarely comments upon. Hayek is implicitly assuming that the contrast of interest is between what he terms a “spontaneous” and “organizational” order. In the former, individuals order their *own* actions by obeying abstract rules of conduct. In an organizational order, on the other hand, the conduct of some individuals is governed by the goals of *others*. This distinction is identical to the one that I employ when contrasting abstract with concrete societies. Abstract societies are those which are governed by abstract rules of conduct, while concrete forms are those governed by more concrete goals and methods. An important point to keep in mind is that while a spontaneous social order is equivalent to our usage of an “abstract” society, this is not uniquely associated with *Gesellschaft*-type societies. Both *Gesellschaft* and *Gemeinschaft* social forms can be governed by abstract mechanisms. “Abstract” and “concrete” societies refer, then, to the mode of governance over that society. Now, I *am* arguing that *Gesellschaft*-type societies are necessarily associated with abstract forms of governance. But this is not to argue that abstract forms of governance are *exclusively* associated with *Gesellschaft*-type societies. Nor is the argument that organizational social orders are associated with particular types of *Gemeinschaft*-type societies, though this might be an argument one might make. The essential point which I wish to emphasize is that there is a difference between the degree of commonality of a society (which underlies the *Gesellschaft*/*Gemeinschaft* distinction) and the type of mechanisms which govern a society (which underlies the abstract/concrete society distinction), and that there is a necessary relationship between abstract mechanisms and *Gesellschaft*-type social order.

Thus, the abstract/concrete order distinction is distinguishing between different forms of *conduct governance*, while the *Gesellschaft*/*Gemeinschaft* social order distinction is between degrees of commonality. It is important to be clear on this distinction, for confusion on this point can lead to an implicitly disdainful (or perhaps even contemptuous) attitude towards *Gemeinschaft* forms of society, in that these forms of society become implicitly associated with restrictive forms of conduct governance. This is certainly not the attitude adopted by this thesis. *Gesellschaft* and *Gemeinschaft*-type societies are simply *different* forms of social order. There is no relationship in “superiority” or “inferiority”

between the two types of order *unless* by this one means the ability of each type of order to satisfy certain goals or values. If this is what is meant, then one *can* make a case that each type of order is better-adapted to satisfying different types of goals and values. It is the argument of this thesis that if one desires a diverse society — one in which individuals pursue their own goals which might differ across individuals, and one in which individuals from different cultures, values, backgrounds, histories, etc. co-exist — this is best satisfied in a *Gesellschaft*-type society. If, on the other hand, one desires community in the sense of concrete commonality with others in the community, this is best satisfied in a *Gemeinschaft*-type society. The interesting question, from the point of view of this thesis, is whether there exists a compatible match between individuals' *desired* degrees of commonality and the degree of commonality which *actually* exists. If it is felt that there is not such a match, the question of even greater interest is *how* individuals go about trying to change this.

This brings us back to the original question of what Hayek means by the idea of the “fullest flowering” of moral virtues. Essentially, Hayek's argument is that in environments of complexity, it is the mechanisms which support abstract societies which are essential to the widest range of individuals being considered as autonomous moral agents. It is important to be clear that Hayek is contrasting the differences between governance structures for societies which range over wide expanses of diverse space-time. Thus, Hayek contrasts abstract rule-based mechanisms with other, more concrete mechanisms while presupposing a complexity which is similar to that which one experiences in a complex society. In essence, then, Hayek is asking the question of whether concrete mechanisms are *capable* of supporting moral autonomy for individuals, given that they (the individuals) exist in the complexity and diversity of a *Gesellschaft*-type society.

A second, more general, objection to the idea of a necessary relationship between governance by abstract rules and moral virtue focuses on the relationship between rules of conduct and autonomy. This argument could run as follows: “Hayek's claim is erroneous because it conflates the distinction between acting on rules and being able to act autonomously. An individual might follow rules which have been created by others, and these rules might embed the purposes of the other, and not of the individual. Thus, one is not necessarily acting as an autonomous agent when one is following rules”. Is this a persuasive objection? I think not — but it is an important objection nevertheless. To give a considered response to this requires approaching the objection in two different ways. The first two comments take the objection on its own terms. The third comment does not,

however, and argues that it is the implicit presuppositions of this objection which diminish its force and reveal to the reader one possible misinterpretation of the theory outlined in this chapter.

The first comment argues that the claim that someone can embed their intentions in rules can be interpreted in a variety of ways. It can be argued that there are two issues of importance at play here: the *type* of intentions which are manifested and *how* these intentions are manifested. In particular, it would be (a) *the degree of abstraction* and (b) *the degree of negativity* of (c) a *system* of rules in which these intentions were manifested which would be of decisive importance. In other words, whether a rule specifies a concrete action or a general class of actions is important. Equally pertinent is the question of whether the rule demands action or prohibits it. And so are the systemic implications of any particular rule (i.e. the effect on conduct when an individual rule is taken in combination with other rules in effect). Hayek argues for the use of systems of relatively abstract negative rules. These systems exclude abstract forms of action. He is not extending his argument into a call for systems of extremely general negative rules (which might exclude extremely large classes of action, though this would be counter-balanced by the fact that they would be quite vague and hence require more individual judgment) nor for systems of very concrete positive rules (which demand particular forms of behaviour and hence can be very restrictive of “individual liberty”).<sup>43</sup>

Second, the argument that I am making is not that following abstract rules of social conduct is a sufficient condition for acting autonomously, but rather that it is a necessary one. Abstract rules may indeed manifest the intentions of particular individuals, and this may lead one to act in a way that one would not have chosen if the rule did not exist. But the function of the different filters mentioned above is to decrease the latitude one individual has in controlling another. It is in this sense, then, that *universally* subjecting conduct to the governance of rules is a filter of sorts, in that such governance filters out conduct which is not sufficiently regular to fall under rules. Restrictions governing these rules — demanding, for instance, an “adequate” degree of abstraction — perform still more filtering. The

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<sup>43</sup> There is thus always a balance which must be struck between the relative abstractness and concreteness of rules. On the one hand, the abstractness (generality of reference) of rules is related to its applicability in a wide variety of environments. The more abstract, *ceteris paribus*, the more environments the rule encompasses. On the other hand, the concreteness of a rule in part determines the certainty of a rule. If a rule is very abstract, it leaves room for individual judgment. If it is very concrete, it decreases this element of judgment. This decrease in individual judgment, however, can be one aspect contributing to the increasing certainty of a rule.

purpose of these filters is to decrease the control one individual can have in directing the conduct of another. If such direction occurs, it must be (a) “sufficiently” regular, (b) prohibitive and (c) “sufficiently” abstract (such that I can implement my own goals and, at the same time, be able to obey the rule without having to make further references to the particular goals of rule-makers).

Third, and perhaps most important, are a couple of points that will be discussed at greater length later in the chapter in relation to the legal theory of H.L.A Hart, but which deserve a brief mention here. The objection that predominantly negative abstract rules of conduct do not necessarily preserve individual autonomy contains three implicit assumptions. First, it implicitly presumes that such rules are *created* by some individuals. Second is the assumption that some individuals *impose* rules on others. Third, it assumes that such rules are articulated. This view, then, simply presupposes that the authority structure of society is such that one group *can* create and impose *their* rules on others. The assumption that rules are in the form of words seems to flow from this implicit premise.

These presuppositions are utterly incompatible with the notion of conduct governance mechanisms found in this chapter. Not only does this view simply presuppose a societal authority structure where individuals can impose their particular rules on others, but it also conceives of rules primarily in their articulated forms. Both of these assumptions are rejected by the framework of this chapter. The theory spelled out in this chapter presupposes a conduct governance mechanism based on rules which must pass through the particularity filters of the previous chapters, the function of which is to filter out the particular goals of particular individuals or groups. Under such a theory, rules are not necessarily articulated. As I shall argue later in this chapter and in the chapters which follow, this implicit vision of top-down authority, in which some are able to impose articulated rules on others, is based on a mistaken notion of social order and an equally misconceived belief in the causal relationship between law and society. Furthermore, such a vision implicitly presupposes that rules *can* be alienated and imposed on others and, as pointed out in the previous chapter, such an idea is only compatible with some, but not all, notions of rules. Such a view, then, *can* argue that rules are not necessarily compatible with autonomous action because it implicitly presupposes the existence of an authority structure and a notion of rules which makes this a possibility.

All of this leads to one final point. The discussion thus far has focused on the filters of the previous chapters. A question which has not yet been raised is whether there are any



further filters which should be considered. The answer to this is that there is one further filter to be introduced. In the following chapter, which introduces the principle of the Rule of Law, a *minimum coercion filter* is introduced. This is based on the idea that legal rules must be to some degree in conformity with the general rules which individuals are *already* following. If one's pre-existing regularity is replaced by rules of conduct from another, one loses one's autonomy. This is an important argument, and I will give it a more considered examination in the section examining Hart's legal theory, and in the chapter which follows. For the moment, though, consider one important point that it highlights. The objection above does not deal with the relationship between rules which are imposed from outside and rules which are, in a sense, imposed from "inside". Yet the *way* that rules govern conduct is of decisive importance. A Hayekian theory explicitly assumes that individuals are already following rules which order their conduct. It is important to acknowledge this. If this is not recognized, one has no way of realizing that the imposition of one set of rules might be supplanting another set of rules (which exist within individuals, which are perhaps even in part constitutive of individuals, but which were not designed nor deliberately created by them). The question is not merely one of whether or not individuals should follow rules in their social conduct, for to some extent they already do. The question is rather the *way* in which rules govern conduct, and this question in turn depends upon the *type* of rule one is following (i.e. is it abstract or concrete, positive or negative, and to what degree) and the authority structure presupposed by those rules (i.e. are the rules imposed from "outside" or from "inside", are they obeyable using my (internal) judgment or do they require (external) references to authority and, if so, to what degree and of what type, etc.).

#### **17. Why individuals are governed by abstract rules: the argument from complexity, part II**

This section turns to the question of why individuals are governed by abstract rules, and approaches it from another angle. The aim here is to summarize some of the evolutionary foundations of the Hayekian approach, and to investigate some objections which might be made to these. It should be stressed at the outset that the discussion is necessarily quite simplified, with its main goal being to lay out the Hayekian position and to examine some of its implications.



The Hayekian explanation for the emergence, and importance, of abstract rules of conduct rests upon a conjectural ontological assumption, and is supplemented with some general evolutionary arguments which draw from themes present in biological psychology and evolutionary neurophysiology.<sup>44</sup> The ontological assumption is that a fundamental source of complexity flows from differences in space-time. Because particular points in space-time are different from others, the world that exists is comprised of fundamentally different environments. Organisms which evolved and adapted to these different environments developed differently, depending on the particulars of their environments and the nature of the organism's adaptations to it. As these organisms spread across space and, through replication, persisted across time, they encountered different environments to which they continued to adapt.

The social aspect of complexity arises from the fact that the environment of one organism might frequently consist of other organisms of the same, or of different, types. These organisms are themselves complex in that they are capable of generating complicated action patterns, which are themselves adapted to the particular environments in which the organisms developed and evolved. Now, for an organism adapted to one particular space-time environment to be adaptive in another environment, there must be a common adaptedness to *general* aspects of these environments. In other words, the adaptability of an organism to different space-time environments is dependent upon the degree to which the rules of conduct governing their activities are *abstract*.

If this story is correct, and if the organisms were faced with an increasing level of environmental complexity (stemming, in part, from the growing complexity of the actions of one's cohorts), what are the implications for one particular form of activity that some complex organisms (and, in particular, humans) can perform, this being the act of judgment? As the environment facing individuals grows more complex, individuals become less and less *able* to judge the particular circumstances governing the conduct, and influencing the judgments, of others. This increasing lack of a capacity to judge concretes would necessitate a withdrawal from the *particularity* of judgment, i.e. there would need to

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<sup>44</sup> These neurophysiological themes will be revisited at greater length in the final chapter of this work. For the purposes of this chapter, the essential idea is that mind might be capable of absorbing and, in some senses, representing aspects of its environment. It might be noted that this does not imply that an environment is represented within mind in the *same* form as is present in the environment, nor does it imply that this representation is "perfect", nor that it is *solely* of the world external to that mind (as will be discussed in the final chapter).

be a move away from conduct and judgments based on particular circumstances and contexts, and towards those based on *general types* of situations. The increased degree of abstraction of rules of conduct and judgment would be more adaptable to a wider range of environments, but it would bring with it an associated decrease in the ability to judge the *particular* circumstances of each *particular* case.

The argument, then, is that as the environment of individuals becomes more and more complex, and as it contains an ever increasing number of particulars, individuals will need to orient themselves to an increasing degree using abstract rules. Moreover, increases in complexity cannot be overcome by increases in individual concrete knowledge, for increases in such knowledge by one individual represents increases in complexity to other individuals (as individuals are part of the environments of other individuals). The effect of an increase in complexity is, then, interactive and relative; interactive, in that it is the interplay between different individuals having different knowledge which in part constitutes the problem of complexity and the difficulties of achieving social order, and relative, for although knowledge for “the society as a whole” may increase dramatically, an individual’s knowledge *relative to* this “whole” will represent an ever decreasing proportion, as specific individuals increasingly know less and less of the “totality” of knowledge of a society.

What are the implications of all of this for conduct governance? One would be that attention must be paid to an intimate relationship between the degree of particularity which is manifested in conduct governance mechanisms and the complexity of the environment in which it operates and to which it is well adapted.<sup>45</sup> In particular, governance mechanisms which strive to govern situations of increasing complexity in the *same* way for all individuals under its governance would find that it was increasingly necessary to resort to abstracts, rather than to particulars, as the grounds for its rules and judgments. This same shift in the basis of judgment would apply to individuals, but it should be noted that in *relative* terms autonomous individual judgment would refer to more particulars. What this means is that in increasingly complex environments, adaptive judgment based on concretes and particulars would, for reasons of informational and performative complexity, come to fall more and more under the judgment of particular individuals in particular situations. The

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<sup>45</sup> It is important to note that at least part of this complexity is related to increases in the number of individuals who populate other people’s environments. Hence, as the size of a particular group increases, the potential for increasing diversity and complexity increases as well.

rationale for this is that there exists no conduct governance mechanism which is capable of simultaneously producing objective judgments whilst taking these concretes into account.

The argument is, then, that individual's judgments<sup>46</sup> over their own actions should have priority over the judgment of others because individuals have, in some respects, a privileged access to the knowledge of, and control over, their own *conduct*.<sup>47</sup> This prioritization should occur because the complexity of society makes such an assumption, in certain circumstances, adaptive. In other words, the implications of individuality, and its privileging of the judgment of the individual over the judgment of others, becomes, in certain circumstances, more adaptive as the complexity of society increases.

This is not to argue that particulars have no role to playing in guiding conduct, nor is it to claim that the judgment of individuals should *always* be privileged over that of others, for there are a variety of circumstances in which it should be overridden. Consider for a moment the latter issue, and the question which it raises concerning the contexts in which individual judgment should be subordinated to the judgment of others. It is important to note that what these circumstances share is a concern with the fulfilment of necessary conditions for action and for social life. As such, and considered in the context of the operation of governance mechanisms, they are based on both negative and positive obligations. The Hayekian argument is not that it is only negative obligations which have a role to play in a complex society, but rather, that the implementation mechanisms which

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<sup>46</sup> Or *control* over their own actions. It is important to keep in mind that this chapter, and the work as a whole, emphasizes the importance of recognizing the role of performative knowledge. This type of knowledge is in many cases more easily controlled by the individual whose conduct manifests it, and in this sense they can be considered to have a privileged access to it. This is not to deny that individuals external to another might not be able to take control of this knowledge in a variety of ways, but rather to merely point out that in many cases it is reasonable to place the weight of responsibility for controlling certain conduct on those individuals to whom it is often directly (in a space-time sense) "attached".

<sup>47</sup> To quote from the first chapter, this does not imply that this access is "somehow 'transparent', 'unmediated', or infallible. Nor does it imply that there is no interpretation required for one to "figure out" what one's own beliefs are", nor that individuals are never incorrect in asserting their own beliefs. Rather, the point being made is that interaction in a complex society tends to lead to more and more individuals knowing each other solely in an abstract way, and that it is this distancing between individuals which underlies the presumption that individuals have a *prioritized* access to their own knowledge, goals, and conduct. The question, then, is not whether in *principle* individuals have privileged access or not, but rather whether in *practice* a complex social order can be sustained if this is not in fact *presupposed*. None of the discussion above would deny that increases in (scientific, psychological, neurophysiological, etc.) knowledge might lead to the possibility of challenging this privileging presumption in *particular* instances. The question, however, is whether this exception to the general rule is of great importance to issues of conduct governance. I would argue that it is not. It can be argued that if this were to be the *standard* method of assessing individual claims, there would have to be a concomitant change in the structure of social relations and authority to accommodate this. From the point of view of this thesis, it is the degree of compatibility between the change in authority structure and the continuing existence of an ongoing structure of social relations which is of great importance. This interactive effect can be seen when the focus is put on society-wide effects which come about when certain methods are applied more generally across society, and might be overlooked if one focused only on its application in particular cases.

ensure that these obligations are fulfilled must be the appropriate ones, given the different nature of obligations based on negative and positive rules of conduct.

Now consider the issue of whether particulars have a role to play in guiding conduct in a complex society. The Hayekian argument is not that particulars have no role to play in guiding conduct, but rather that if they are to play a role, they must enter into judgment and conduct guidance in a well-adapted manner. This is the theme which underlies Hayek's advocacy of "individual liberty" and "individual responsibility". The argument he makes is that if one wishes objective conflict resolution to be a possibility in the context of increasingly complex societies, one must resort to mechanisms which are based on abstract rules of conduct. The claim is that *only* by following abstract rules can the individuals of a complex society orient themselves in a decentralized manner and act "responsibly" and with "liberty". These abstract rules are also a necessary foundation for a *Gesellschaft*-type society, i.e. only by individuals obeying abstract rules of conduct can such a society be generated and sustained. In a sense, "individual liberty" and "individual responsibility" are *artefacts* resulting from the increasing complexity of social interaction. They arise as the result of an attempt to adapt to an ever-increasing relative ignorance, and are a by-product of the mechanism which has arisen as an adaptation to this lack of knowledge. This mechanism consists of following abstract rules.

None of this implies that the concrete is insignificant or unimportant in a complex society, nor that an individual's judgment must always overrule the judgments of others. Consider two objections to the above discussion which are based on these implications. The first objection might be termed the *blindness to the concrete objection*. This states that the discussion as stated thus far completely ignores the role of concrete rules of conduct in guiding people's actions. Furthermore, it passes over intimate relationships, the interaction of those sharing concrete goals, etc.. Basically, the theory completely ignores the concrete — concrete interactions, concrete knowledge, concrete rules of conduct and, ultimately, concrete reality.

This is a serious criticism which is, in a sense, correct. For example, the exclusion of a detailed consideration of the role concrete rules of conduct play in social life has been quite deliberate. The emphasis of this chapter is on abstraction and the role abstract rules of conduct play in orienting behaviour in an abstract, *Gesellschaft*-type society. I have focused on this because it is my view that this relationship is typically ignored, misunderstood or misinterpreted. This notwithstanding, the argument of this chapter should not be interpreted



to imply that concretes are unimportant or irrelevant. Nothing could be further from the truth. Concrete relations are an extremely important and highly valued aspect of social life. Furthermore, they are an indispensable component of mechanisms of social orientation. None of this is at issue. What *is* being called into question is the idea that concrete rules of conduct are *on their own* sufficient to guide conduct in a way which could sustain an abstract, *Gesellschaft*-type society. This chapter rejects this claim and instead emphasizes the importance of abstraction and guidance by abstract rules. But this is not to *reject* the role the concrete plays in society; rather it is to point out that there exists an essential and necessary inter-relationship between the concrete and the abstract. The argument of this chapter is that in a complex society one's knowledge of the concrete *must* be augmented by abstract rules of conduct. Such a view does not dismiss guidance by concrete rules of conduct, but rather expounds the theory that it must be augmented by a framework of abstract rules. A knowledge of the concrete, and being guided in one's conduct by concrete rules of conduct, are of course necessary conditions for any social interaction *at all*. Who would dispute this? But this is not the question, for the issue is whether guidance by concrete rules of conduct is *sufficient* to sustain a *Gesellschaft*-type society. The argument made by this chapter, and the thesis as a whole, is that guidance based predominantly on concrete rules is an insufficient foundation upon which to base the complex interactions of an abstract society, and hence there must be a resort to governance of conduct by abstract rules.

A second objection to the line of argument of this chapter goes to the core of the matter. Call this the *if I'm so ignorant why can't I benefit from outside guidance?* objection. It runs as follows: if, as social complexity increases, individuals become more and more relatively ignorant, how can individuals be expected to take into account their various social effects (i.e. their effects on others)? Surely an increase in the complexity of society implies a shrinkage of the individual sphere of responsibility and (presumably) an increase in the responsibility assumed by other institutions which attempt to take these factors into account.

This is a telling argument and it goes to the heart of the argument presented here. Consider issues such as the pollution of the environment, epidemics, or harm which only manifests itself in the long-term or which has only widely dispersed, marginal, effects, but rather serious consequences. Are these not difficult to attribute to any one individual's (or any one sub-group's) conduct? How, then, are these issues to be addressed using abstract rules of conduct?



There are a variety of responses to this objection, varying in their degree of generality. I will consider three of them. First, a general response. It should be emphasized that there is nothing in the argument of this chapter which implies that group efforts, centralized institutions or collective decision-making mechanisms have no role to play in a *Gesellschaft*-type society, for they obviously do. Rather, this chapter is putting forward the argument that there must be a more careful consideration of *how* these institutions achieve the desired results. The argument of this chapter is that it is the *manner* in which problems are dealt with which is of decisive importance if an abstract, *Gesellschaft*-type form of society is to be sustained.

Turn now to a more particular response to the objection that an increase in social complexity calls for an increasing resort to mechanisms other than those based on individuals following abstract rules. Consider one counter-response, which crudely put states: "but isn't the objection simply *assuming* that some other institutions will do a better job of it?". This does seem to be the case. Consider, for example, the challenges to the idea of resorting to market mechanisms as an acceptable form of conduct governance. A considered application of the approach advocated by this chapter would examine (a) the contexts in which market mechanisms do, and do not, function "properly" and (b) the properties of alternative mechanisms which are capable of satisfying the ends which are desired and which are feasible given one's other values (and in particular, the type of society that is valued). This is the approach recommended by this chapter, but it is not, in many cases, the typical approach. Instead, it is often the case that a market inadequacy is identified, i.e. markets do not produce what some group of people want, and then government action is demanded with the implicit assumption that such action will be an improvement. But why would this necessarily be the case? The fact that one mechanism does not live up to one's expectations does not imply that there exists a *better* mechanism which is compatible with one's goals. Typically, one does not observe a *comparison* between governmental and market mechanisms, but rather the substitution of a governmental mechanism for a market one. Yet governmental mechanisms have inadequacies of their own, and are only well-adapted to certain types of decisions and certain types of environments. In actuality, government mechanisms are simply *assumed* to be the *best* alternative to market mechanisms, without any thought given to the implications for the structure of interactions, of authority, or whether or not the government can do a

better job *than its competitor*. In other words, there is little thought given to a relative comparison of the different properties of different mechanisms.<sup>48</sup>

As a third and final response to the objection raised above, turn now to some of its particular areas of concern (pollution and the environment, epidemics and dispersed or long-term harm). Can these problems be addressed using mechanisms utilizing only abstract rules of conduct? Perhaps they can. As was pointed out in the first chapter, one interpretation of these difficulties emphasizes that they arise through inadequacies in the definition of rules of conduct. On this view, these difficulties do not support a move away from the use of abstract rules of conduct but rather imply a shift towards their refinement so that they can be applied to these particular problems.

But perhaps, in the final analysis, the case can be made that abstract rules addressed to individuals are simply not capable of addressing these issues. This comes down to a matter of investigating the properties of different governance mechanisms and their abilities to perform certain functions in certain environments. To take one example, it is known that market mechanisms tend to function poorly when faced with certain situations economists characterize as “market failures”. This is not in dispute. What seems to be ignored, however, is the *relative* effectiveness of different mechanisms faced with these same circumstances.

This leads to a more general point. From the perspective adopted by this thesis, there is little to be gained from a dogmatic adherence to any one particular mechanism. Nor are vague assertions that one mechanism or another is “better” for one reason or another of very much use without a due consideration of their relative abilities to perform certain functions in the environment in which they will be embedded. One must constantly be wary of falling into the trap of judging a mechanism in isolation from its environment, or from its competitors’ performance in that environment. Is the central question, then, whether such and such problems can be addressed by abstract rules of conduct? It may well be the case that such a mechanism *may* be inappropriate in certain circumstances. But the point of this section is to stress that one will never know unless one considers *alternative* mechanisms in these same environments. The important point, in my view, is that one always *compares* the relative properties of particular mechanisms in particular environments, examines their

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<sup>48</sup> This blanket criticism should, of course, be taken with a grain of salt. After all, there is (for example) a substantial body of work in what is called “public choice” economics which examines, and compares, the properties of alternative political mechanisms, albeit subject to the rather restricted interpretation of “rationality” adopted by many economists. For an example of the application of such a perspective in a regulatory context, see Ogus (1994); for a summary of “public choice” economics, see Mueller (1989).

compatibility with one's immediate goals and long-term values, and asks the decisive question of whether one's favoured mechanism is the best one *relative to* those which are available for consideration.

## 18. Summary of the argument and some implications for legal theory

It is time, perhaps, to halt for a moment and summarize the argument thus far. The chapter began with a consideration of the differences between duties and aspirations. This led to an examination of the relationship between minimal conditions, duties and Fuller's "inner morality of law". The idea was then introduced that basing an identification criterion for law on the presence of "authority" is a mistake, and that it is instead the presence and operation of certain *mechanisms* which is determinative of whether or not a "legal quality" exists. This led to a consideration of the propriety of describing Fuller's principles of legality as a "morality", and it was argued that for Fuller's practice to make sense, he must be arguing that subjecting conduct to the governance of abstract rules is a value. The chapter then turned to an examination of why this might be the case. Three reasons were considered for why subjecting individual conduct to the governance of rules might be a value. Two of these — the argument from complexity, and the argument from autonomy — were examined in some detail and some objections to them were discussed. The third, which emphasizes the potentially objective conflict-resolution properties flowing from governance by abstract rules, was briefly considered in its relation to the autonomy argument, but will be considered in greater depth in the chapter which follows.

All of this leads to three important and sometimes insufficiently appreciated implications for those who attempt to *create* legal rules.<sup>49</sup> The first implication flowing from the above is that if individuals are to be guided by their own conduct and their own judgment, there must be some degree of conformity between the ongoing values and obligations these individuals observe and the rules law-makers attempt to create. This matching between individual conduct and rules promulgated by law-makers will be considered in more detail in the sections which follow.

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<sup>49</sup> It should be emphasized that nothing in this chapter points to the conclusion that rules cannot or should not be created; rather, the theme of this chapter is that such creation is subject to a variety of constraints which have not, in my view, been sufficiently appreciated or which have been labelled as "merely" moral.

The second implication of the above is that if individuals are to be guided by rules *created* by rule-makers, these rule-makers will *themselves* have to conduct themselves with regularity, the reason being that their conduct constitutes part of the environment which individuals are trying to adjust to, and hence irregularity on their part may increase complexity for individuals who are attempting to be guided by the rules that they, the rule-makers, create. This is, I think, one of the most important themes underlying Fuller's discussions of "the inner morality of law". Subjecting human conduct to the governance of rules is thus a value which Hayek and Fuller intend to be applied *universally*. The justification for a restriction on rule-makers behaviour is that unless there is sufficient regularity on the part of the law-makers, individuals will not be able to act using their own judgment but will instead have to refer to authorities for instructions on how to act. This reference to authority is in principle incompatible with the three results which flow from subjecting individual conduct to the governance of rules: that individuals are able to adjust to complexity based on their own judgment, that they are able to act autonomously and responsibly, and that conflicts between individuals are able to be resolved in an objective manner.

A third implication is perhaps the most intriguing from the point of view of legal theory. Under the theoretical framework of this thesis, a departure from either of these first two restrictions on rule-makers<sup>50</sup> is incompatible with the existence of the "legal quality", i.e. that quality which flows from the application of mechanisms which subject conduct to the governance of abstract rules through the filtering out of particularity. One implication of this is that it is not that judges are "authorized" in some special way which gives their actions a "legal quality", but rather how closely they conform to the restrictions implicit in the mechanisms which support abstract social relations and conduct regularity. On this view, the specifically "legal quality" of law does not flow from authorization, but rather from acting in a certain way.<sup>51</sup> This is, I would argue, the general theme underlying Fuller's discussion of the "inner morality of law".

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<sup>50</sup> Through a failure to create a compatible "enough" match between the values of the governed and the rule-makers, or though the irregularity on the part of those trying to create rules.

<sup>51</sup> The implications of this for theories of legal interpretation which search for "original" authorization, such as Robert Bork's (1990), should be obvious.

**19. The meaning of Fuller's objection to the managerialist tendencies of legal positivism: the mechanism is the message**

Conduct governance by abstract rules is a value to Fuller and Hayek because of its intimate relationship to the autonomy of individuals, the ability to adapt to complexity, both as individuals and as a group, and to objective conflict-resolution and the possibility of objective justice. I believe Fuller and Hayek's critics err in assigning a low importance to the *implementation mechanism* which "subjects human conduct to the governance of rules". The decisive issue to Hayek and Fuller is the method whereby behaviour is "regularized" (i.e. made subject to the governance of rules). To them, behaviour is regularized using mechanisms which generate and support rules which allow individuals to act autonomously and in accordance with their own judgment. This would be one reason for their emphasis on the abstractness and negativity of rules of conduct. There are no such similar restrictions flowing from positivist legal theory. Consider one of Fuller's most important critics, H.L.A. Hart. On the crucial point of the *reason behind* subjecting conduct to the governance of rules, Hart is in profound disagreement with Fuller and Hayek.

As an example of this, consider Fuller's objections to the managerial nature of positivism, and to H.L.A. Hart's positivist theory in specific. What, if anything, does this form of positivism have to do with managerialism (i.e. with the one-way imposition of concrete goals upon individuals)? I would argue that one theme of Fuller's objection to Hart's theory is that it has no concept of the mechanisms under which legal rules or legal authority come into existence. Fuller argues that Hart focuses his attention on pre-existing authority and ignores the mechanism under which such authorization comes into existence and is sustained. By ignoring the method by which rules are generated and supported, and by focusing instead on authority which is presupposed to exist, a theory of law emerges which ignores the functions performed by abstract rules and their relationship to the formation and preservation of authority.<sup>52</sup> This can lead to the creation of rules which function to undermine their own authority. In a sense, Hart's vision of law and legal authority is *path-independent*, for it does not focus on the question of *how* law and the "legal quality" come into existence and are supported. Hart's theory simply assumes that the existence of legal authority is a factual question. So long as "enough" individuals actually

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<sup>52</sup> This point will be emphasized in those sections of the following chapter which examine the theoretical underpinning of Hartian legal positivism.



obey the rules of a “legal system”, and so long as legal officials hold and apply certain authorization criteria, legal authority can be thought to exist. *How* this conformity *actually* comes about is left as a background issue. Authority and order based on conforming to abstract rules is merely *one* way of achieving legal order. It does not have any privileged relationship to law or legal mechanisms. By not prioritizing rule-based methods of generating authority and social order, and by not recognizing the importance of the mechanisms which are used to generate and support authority and order, positivism in effect leaves a mechanism vacuum which can be filled by any method which generates social order, so long as it is “authorized”. By ignoring the differences in types of social order, by failing to realize that a connection exists between the resultant type of order and the method by which it was generated, and by not understanding that only certain types of mechanisms are capable of sustaining certain types of social order, positivism leaves open the door to *any* form of “authorized” social control, many of which are incompatible with the foundations of a society based on autonomous individuals adjusting to complexity based on their own knowledge and resolving their disputes in an objective manner. Fuller, then, is not arguing that positivist theories *intend* to provide support for managerial-style social orders. On the contrary — many of its representatives are vocal supporters of individual freedom and the value of autonomous action.<sup>53</sup> Fuller is instead arguing that positivist legal theories cannot *rule out* the mechanisms which make a managerial-style social order a possibility, and hence that such theories cannot explain the basis for, nor the differentiating features of, the *legal* sphere. In this sense, then, such theories are inadequate representations of that which is specifically legal.

Fuller’s criticism has another aspect which should be explored. Fuller’s argument thus far is based on the idea that Hart’s form of positivism shows no recognition of the importance of the properties of implementation mechanisms. Fuller argues that by ignoring this, Hart’s theory cannot close the door on mechanisms which are not capable of sustaining a complex form of society. One might call this critique the *implementation objection*.

One might make a different argument based on a similar idea. This objection to Hart’s form of positivism might be called the *elitist objection*. This criticizes the positivist belief that law must be based on the beliefs, knowledge and *direction* of an elite set of individuals. Hart’s positivist theory — and not only Hart’s version of positivism — can be accused of

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<sup>53</sup> A point emphasized by MacCormick in objecting to Fuller’s argument (MacCormick 1981, 157-158).

being an elitist theory, for it explicitly states that the acceptance of the rule of recognition can be limited solely to legal actors, implying in a sense a top-down imposition of authority from those “in-the-know” to those who know little or nothing of the law.

## 20. A closer look at the elitist objection

Is there anything to this objection? Perhaps there is. One way of seeing this is to consider Hart’s discussion of the concept of the “rule of recognition” and to observe the sources of the subtle but decisive shift in the meaning of this concept. In what Hart terms “pre-legal” societies the recognition of authority is at best implicit (Hart 1961, 91). At this stage of a legal system, authority rests in large part with individuals. If, however, this authority comes to be manifested in something *external* to these individuals, however, there comes to exist what Hart terms a “rule of recognition”. This, then is a rule that recognizes *that which is authoritative*. In simple societies, the rule of recognition is a rule which is “the *proper* way of disposing of doubts as to the existence of a rule” of obligation (Hart 1961, 92). Thus, the rule of recognition “will specify some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts” (Hart 1961, 92). It is, then, “a rule for conclusive identification of the primary rules of obligation” (Hart 1961, 92). In this context, the rule of recognition is something or someone that *manifests* the group’s sense of “authoritative”.

In more complex societies, however, the rule of recognition becomes something quite different. In Hart’s discussion the rule of recognition subtly transitions from a rule which manifests the *group’s* sense of what is authoritative to one which manifests a *particular group’s* sense of authoritative. Thus, although Hart talks of situations where a rule of recognition is accepted as authoritative being one in which “both private persons and officials are provided with authoritative criteria for identifying primary rules of obligation” (Hart 1961, 97) and in which the rule of recognition is “used by courts, officials and private persons” (Hart 1961, 104), it soon becomes clear that Hart is referring to a situation in which only a select group of individuals recognize what is, and what is not, authoritative. The transition to his final position is a subtle one. First, Hart discounts as a “fiction” (Hart 1961, 111) the factual accuracy of a position which holds that all the individuals in a society know the rule of recognition of the legal system. Hart’s argument here is that modern

society is too complex for all individuals to know the rule of recognition. In a complex society, “the reality of the situation is that a great proportion of ordinary citizens — perhaps a majority — have no general conception of the legal structure or of its criteria of validity” (Hart 1961, 111). Thus, Hart’s focus turns to “legal officials” and *their* understanding of the rule of recognition and, once again, there is subtle modification. Hart now claims that the “ordinary individuals”, in

obeying a rule (or an order) *need* involve no thought on the part of the person obeying that what [they do] is the right thing both for [themselves] and for others to do: [they] need have no view of what [they do] as a fulfilment of a standard of behaviour for others of the social group. [They] need not think of [their] conforming behaviour as ‘right’, ‘correct’, or ‘obligatory’”. (Hart 1961, 112)

On this view, the rule of recognition is a “public, common standard of correct judicial decision” (Hart 1961, 112) only in that it is an *externally observable* standard which is common *to legal officials*. It is not necessarily held as authoritative by ordinary individuals. Thus, Hart’s notion of the rule of recognition has become one in which the authority to recognize obligations as binding no longer resides with ordinary individuals but rather solely with its officials.<sup>54</sup> Hart’s argument, then, is that in complex societies

only officials might accept and use the system’s criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end up in the slaughter-house. But there is little reason for thinking that it could not exist or for denying it the title of a legal system. (Hart 1961, 114)

What can one say about this vision of law? One point to note is that the idea of authorization being limited to a select group is a widespread one in positivist circles. Thus, although they hold to different positivistic theories of law, both Joseph Raz and Neil MacCormick subscribe to this view.<sup>55</sup> If, then, Hart’s view is unsound, this would seem to have implications for other positivist theories as well. The second point to note is that Hart’s view, which restricts the knowledge of the rule of recognition to legal officials, is based primarily upon an argument concerning the implications of the complexity of a modern society. That is, the *justification* given for assuming that large numbers of ordinary individuals in a complex society *could not know* the rule of recognition is based on the argument that the *division of knowledge* in such a society is of such complexity that individuals would, in all likelihood, know nothing of this rule. Thus, the argument is that it

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<sup>54</sup> Hart is quite explicit on this point. For a more detailed discussion, see Hart (Hart 1961, 114).

<sup>55</sup> See Raz (1975, 171, 177) and MacCormick (1978, 54-55) for their statements on the matter.

is the complexity of a modern society which necessitates the restriction of the rule of recognition to the group of legal officials. The fundamental assumption of this argument is that ordinary individuals do not (and probably could not without legal training) know the rule of recognition and hence this specialized area of knowledge and authority must be vested in a particular group of individuals.

The question which arises from all of this is whether this is correct. Is it the case that the rule of recognition is for the most part known only to legal actors? The answer to this question is a factual one, but it is not the one positivists usually give. The answer to this question is that people for the most part *do* know *aspects* of the rule of recognition, and these aspects are the *abstract* ones.

The reason they know the abstract elements of the rule of recognition is that these aspects *already* govern their lives. In other words, individuals *manifest* ("act out") these aspects in *regularities* which in part constitute their conduct, and which arise from, and are sustained by, the same mechanisms which support the "legal quality" in its more institutional manifestations. These abstract regularities (or abstract rules), then, are manifested in individuals' *conduct*, and are not necessarily in the form of words or conceptualizations. But what, then, are these rules? None other than the minimal necessary pre-conditions for sustainable social interaction; that is, they are abstract, primarily negative (in the sense of being prohibitive), rules which govern individuals in their day to day lives and which sustain complex patterns of social interaction.

But why, one might ask, do these rules overlap with aspects of the rule of recognition? Surely the rule of recognition can contain *different* sorts of authorization criteria? The short answer to this is that it cannot. The rule of recognition is itself based upon these same minimal criteria and the mechanisms which support them, and if the rule of recognition is to be authoritative it must be, in some of its aspects, the *concretization* of these pre-existing minimal obligations and values. The positivist's error, then, lies in presupposing that people's knowledge of the rule of recognition is a *conscious* knowledge of its *concrete* detail.<sup>56</sup> This, however, is not the case. What ordinary individuals *do* know are the *abstract*

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<sup>56</sup> This error is at the base of one of Hans Kelsen's flawed objections to natural law theories. In criticizing natural law, Kelsen makes a revealing comment. One of his chief criticisms of natural law's notion of justice was that its content was so variable across individuals. From this Kelsen claims "[t]he usual assertion that there is indeed such a thing as justice, but that it cannot be clearly defined, is in itself a contradiction" (Kelsen 1941, p. 48-49). I would disagree, for Kelsen seems to be presuming that knowing something implies that one is able to describe it clearly at *all* its different levels of abstraction. This is patently false. If it were true, it would be impossible to say (as one often does) that one knows something at a general level of abstraction but cannot



and often *unarticulated*, yet able to be acted upon, aspects of this rule. If one accepts this, then it becomes obvious that Hart's positivist legal theory begins to unravel.

The justification for Hart's claim that the authorization manifested in the rule of recognition is restricted to a small subgroup of society is based on a misunderstanding. A division of knowledge does not imply that there are no shared *abstract performative regularities* and hence no shared obligations and values, but rather only that there will be an increase in *particular* differentiations and a decrease in one's ability to *consciously ascertain and articulate particulars*. This epistemological error is of decisive importance. Not only does Hart fail to recognize that individuals could know (in a different sense from "in words" or "conceptually") the abstract aspects of the rule of recognition, but he also fails to realize that it is this abstract knowledge (of obligations and values) which provides the *foundation* for this same rule. It is these abstract performative aspects which provide the *minimal* conditions for the existence of *any* "authority", for without these obligations there is no group and no society for law to govern. Hart neglects to consider these minimal conditions and simply presupposes that "authority" exists independent of them. But it does not — "authority" flows *from* conforming *to* these minimal obligations and the mechanisms which support them. Hart also ignores the form of these minimal conditions, i.e. their being *abstract* and predominantly *negative*. This oversight is an unfortunate by-product of an emphasis on the "authorization" of acceptable acts, rather than on the negation of unacceptable ones, and is related to his lack of insight into the properties of conduct governance mechanisms, in that abstract values and the predominantly negative obligations which are associated with them are intimately related to mechanisms which filter out and negate unacceptable conduct, rather than to processes which "authorize" acts. Furthermore, the very use of the terms "authorized" and "unauthorized" are revealing — both *presuppose* the existence of authority. The question of interest, which Hart ignores, is whether this authority actually exists if one holds that it does not flow from conformity to either the minimal conditions which govern and preserve a society, or to the mechanisms which support them. The important question, then, is not what is "authorized" or "unauthorized", but rather whether there is any authority *at all*, and, if so, *what* generates and supports it? One further objection to the use of the term "authorization" is that by presupposing that authority exists independent of its own pre-conditions, one effectively ignores authority's

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describe its particular details. It is obviously possible for one to know and describe, in general, an area of mathematics but not know, or to be able to clearly define, some of the detailed theorems of that particular branch.



dependence on negative rules and hence implicitly manifests a bias towards positive rules of conduct<sup>57</sup> which, so long as they are “authorized”, will be presumed to have legal force.<sup>58</sup>

By referring all questions of the existence of legal obligations solely back to a rule of recognition, Hart ignores the *foundations* of authority — the pre-existing, ongoing, predominantly negative, *abstract* obligations and the mechanisms which support them, both of which support the values upon which the authority of the rule of recognition rests. It is this uncoupling of the rule of recognition from its foundations which detaches Hart’s positivist legal system from its own pre-conditions, and it is this separation which opens the door to changes in obligations which could undermine the very *basis* of the authority embedded in a rule of recognition. There is an inherent incompatibility, in both an intertemporal and feedback sense, in recognizing certain obligations as legally authoritative when these very obligations undermine other, more fundamental obligations which provide the grounds for giving such an undermining obligation legal force in the first place.<sup>59</sup>

This discussion, then, leads us to two further questions. First, what is the relationship between the rule of recognition and these minimal and foundational *pre-existing* obligations? Second, what is the relationship between obligations created *under* the rule of recognition and these minimal pre-existing obligations? Both of these questions can be given the same answer: both the rule of recognition and obligations created under this rule are subordinate to, and dependent upon, the satisfaction of certain minimal, pre-existing, and predominantly negative, obligations which are supported by the operation of certain fundamental mechanisms. The rule of recognition can recognize as authoritative that which does not conflict with these minimal obligations and mechanisms, but it cannot extend its authority beyond this, for its authority derives from conforming to the restrictions they impose in supporting the abstract values which underlie them. Hence, not all rules of obligation created under the rule of recognition are rules of law, for they must in some sense conform to the pre-existing obligations and the restrictions implicit in the mechanisms which support them, and which provide the foundation for whatever legal authority Hart’s secondary rules might have.

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<sup>57</sup> A point which was stressed when the presuppositions underlying power-conferring rules were considered in chapter five.

<sup>58</sup> This bias is widespread, and might be one reason why law is sometimes seen as an instrument with the potential for achieving goals and aspirations, rather than as a mechanism focusing on the prevention of harm.

<sup>59</sup> This aspect of positivist thought, and its relationship to the distinction between rules based on performative regularities and those which are based on authoritative articulations, will be examined in greater depth in the chapter which follows.

Contrast, then, Hart's legal theory with the notion of a legal system ("the law", or simply, "law") and rules of law which underlie this work. Both theories are based on the notion of a legal system and rules of law. In both, a legal system is comprised of both rules of obligation and rules of social institutions which govern these obligations.<sup>60</sup> Rules of law refer solely to rules of obligation and not to rules governing the social institutions of law.<sup>61</sup> A rule of law, then, is a rule which imposes an obligation on individuals or groups.<sup>62</sup> Up to this point, there might appear to be many similarities between the two theoretical perspectives. But it is here that the similarities end.

As I have argued at a couple of points in this chapter, Hart's conception of law simply presupposes that legal authority exists (or does not exist), and treats it as a matter of "fact". On this view, a legal system and legal authority exist when enough individuals conform to the rules that a group of legal officials accept as being legally authoritative. This legal authority is then implemented in a variety of ways, some of which include the promulgation of general rules in the form of words. These rules are not necessarily considered to be "authoritative" to individuals that obey them (at least not in the legal officials' sense of that word), nor are there any necessary restrictions on the content of these rules unless such restrictions are recognized as binding by the select group of legal officials.

All of this is based on a fundamental misunderstanding. This view implicitly privileges a notion of law where there exists a pre-existing authority which allows a select group of individuals to create articulated rules which are then imposed upon others. Yet no mention is made of the *pre-conditions* which must be satisfied for such an authority to exist. This blindness to the foundations of authority leads to a number of substantial errors. First, it ignores the *performative* nature of these pre-conditions. Instead, this view emphasizes

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<sup>60</sup> In Hart's terminology, this is the difference between "primary" and "secondary" rules. Note that I am not importing Hart's notion of rules as being relatively concrete, nor am I assuming that they are articulated. Thus, in some societies, both of these forms of rules may be unarticulated and the forms of "social institutions" may be lacking in formalization.

<sup>61</sup> In other words, and using Hayek's terminology, the phrase "a rule of law" refers to a rule which governs individual or group conduct in a society-wide context, and does not refer to those rules which govern the specifically institutional sphere occupied by the *organizations* of law.

<sup>62</sup> It is of the utmost importance not to conflate these two terms (though the terms "the law" and "law" seem to court confusion), as this study focuses both upon rules of obligation — rules of law — and upon some of the rules of social institutions which govern these rules. Thus, one of the focuses of this study is upon the properties of rules of obligation, and the argument is that in an abstract society the social rules of conduct governance would need to be abstract and predominantly negative. The manner by which rules become abstract and negative is the study of rules of social institutions, as manifested in a variety of what I have termed (selection) filters, which weed out unacceptable rules. The distinction being made here, then, is between legal rules — rules of obligation — and rules which are restricted to governing the operation of institutions.

articulations. Second, this view ignores the *abstract* and *predominantly negative* nature of these pre-conditions. On the positivist view, rules can be of any degree of concreteness, and they can both oblige one to act or require one to refrain from acting. Neither abstractness nor negativity is seen as being essential to a rule being a *legal* rule, nor is it thought to undermine the “authority” of those officials who the positivists claim recognize acts as having legal force.

This is a mistake. It is of decisive importance to recognize that not all rules promulgated by those in “authority” will be *legal* rules. The theory of this chapter differs from Hart’s theory in its recognition of what is, and is not, a “legal rule”. Hart’s vision of legal recognition implicitly emphasizes deliberately and authoritatively created articulated rules. This is misleading. Not only is performance downgraded in importance, but so also are rules that have never been “created” (in the sense of deliberately created), nor “authorized” by anybody. This chapter has emphasized that this bias of legal positivism and its consequences have not been fully appreciated — one of these consequences being that the specifically legal character of legal systems has been misunderstood. Under the argument put forward in this chapter, the specifically legal character of a rule comes from it being able to pass through a variety of filters which eliminate its particularity. Conduct which cannot be put into the form of an abstract rule, conduct which is based on the particular will of a particular individual or group, positive rules, and rules which are too concrete, should be eliminated by these filters. The reason for this is that such conduct (and such rules of conduct — if they exist) are incompatible with law’s function: to regularize the conduct of individuals by subjecting them to the governance of *abstract* rules.

Furthermore, such filters are designed to safeguard the necessary pre-conditions of social life which exist in the form of *pre-existing, predominantly negative and abstract, values and obligations*. These values exist in people’s *conduct*, and they are instantiated by conduct that people *do not* perform. The *reason*, then, for filtering out particularity and positivity is that such rules *can* be in *conflict* with these fundamental values. The flaw in the view which stresses “authorization” is that it is not simply a matter of “authorization” whether a conflict exists between a created rule and these pre-existing obligations and values — “authorization” does not eliminate conflicts between *the conduct* engendered by created rules and these pre-existing obligations. Rather, such a view simply *ignores* such conflicts by *presupposing* that the “authorization” of a select few is sufficient to override them. This thesis contends that such “authorization” is not sufficient, and would even go so far as to

question the positivist definition of “authorized”. Rules which are created must *conform* to these pre-existing obligations because it is these obligations which are the foundation for any authority, including that to which deliberately created rules have a claim.

The implicit notion of a legal system based on top-down “authority”, in which some are able to impose rules (in the form of words) on others, is based on a mistake — this being that rules can be “authoritative” when they are in conflict with the sources of authority. This is false and pernicious: false, because it is not “authority” which underlies such a vision of law, but rather power which lacks any objective authority whatsoever; and pernicious, because such a vision of law can lead to particularistic rules being created and enforced which are incompatible with autonomy, complexity, diversity, and indeed the very foundations of social life. In the final analysis, all of these (i.e. autonomy, etc.) are based upon the existence of expectations engendered by pre-existing, predominantly negative and abstract values and obligations. Only a vision of law with fundamentally misconceived notions of the foundations of “authority”, social order, and the causal relationship between law and society could come to the view that there could exist legal “authority” for rules which are incompatible with the pre-existing obligations of social life which are instantiated in individuals’ day to day conduct. And only such a vision of law could fail to realize that it is *their own* mistaken notion of “authority” which makes the creation and enforcement of such incompatible rules, the consequent undermining of individual autonomy, societal complexity and diversity, and the destruction of the notion of objective justice, a very real possibility.

## **21. The conflict between perspectives over the sources of social order and the causal connection between law and society**

I would like to put forward the view that both the filter-failure and elitist objections are merely two manifestations of a much more fundamental discrepancy between the positivist and the mechanism approaches. The underlying disagreement between these two theories of law rests upon their implicit assumptions concerning the *causal connection of law to society*. This disagreement in turn rests upon different views on *the sources of social order*. One view is based on the assumption that social order does not pre-exist and must be generated. This view is intimately related to the idea that for social relations to be ordered, order must be imposed on individuals by other individuals. This, I would argue, is an



implicit presupposition of Hart's form of legal positivism. The opposing view is that individuals are *already* ordered, and that an imposition of external authority might or might not lead to an individual and/or society being "better" ordered. This is Hayek's view and, perhaps to a lesser extent, Fuller's. If this argument is correct, then there are two fundamentally different ways of viewing the nature of social order. This is a very important difference — perhaps the most important difference between Hayek and Fuller and their critics. An insight into this difference is essential to understanding the nature of the dispute between these two rival theories of law.

So important is this difference that it is manifested in a variety of issues, including (1) their underlying notions of law, (2) the distinction between discovering and creating law, (3) the differences in the types of knowledge each view emphasizes, (4) the issue of the autonomy of law and (5) the type of validation (authorization) provided to legal rules by law-makers, (6) the role of government action in society, (7) the notion of Rule of Law, and finally, and more generally, (8) the importance of abstraction, (9) the importance of the negative rule / positive rule distinction and (10) the difference between duties and aspirations and their relationship to negative and positive rules.

The first manifestation of this difference is in *the notion of law* itself. The view which stresses pre-existing order presupposes the existence of rules that individuals are *already* following in orienting themselves. The view which stresses imposed order presupposes that rules must be created and enforced to generate any order at all.

Different perspectives also emerge when one considers the *creating/discovering law* distinction. Those that believe that order is discovered claim that there already exists an ongoing order and that the rules that law-makers propagate must take this into account and try to accommodate their created rules to this ongoing order. Those that believe that order is created (imposed) believe that rules can create new patterns of conduct. They do not emphasize accommodation so much as imposition.

The third instance arises when one considers the *types of knowledge* which each view emphasizes. Those who believe that order is pre-existing emphasize the manner by which ongoing order comes to be generated. This leads to the emphasis of unarticulated rules of conduct and rule-following, with attention given to performance and how individuals orient *themselves*. Those who believe that order must be generated and imposed also focus on the manner by which ongoing order comes to be generated; however, this view emphasizes order imposed by one group on another, and hence focuses on the tools of this imposition:



articulated (verbal, written) knowledge and communication *between* individuals (for how could I impose a rule upon you without first communicating it to you?).<sup>63</sup>

This leads to differences of perspective on the issue of *the autonomy of law*. Those holding the view that order is pre-existing emphasize that law-makers' rules are merely one form of rule which might guide conduct, and stress that there must be a mutual accommodation between rules of law and other pre-existing rules of conduct. On this view, law is autonomous only insofar as it does not destabilize an already pre-existing order. Those who hold that order must be generated and imposed stress the autonomy of law, in that it becomes so specialized that it forms a closed system which interacts mainly with itself and generates order by imposing rules on unordered social interactions. This view does not focus on the mutual interaction between different rules of conduct systems, nor does it emphasize an already existing order to society. The stress instead lies on a one-way imposition of authority.

These different emphases on the degree of autonomy manifest themselves in differences in *the type of validation* (authorization) which is given by law-makers. The view which emphasizes ongoing, pre-existing order argues that law-makers give legal force to rules by adhering to certain validating procedures that they (should) follow to discover what the law is. The emphasis is on generating rules according to these validating procedures which "fit in" with an already pre-existing and ongoing order. Those that emphasize imposed order tend to argue that law-makers' rules gain legal force because they are acting in accordance with certain procedures, but they also emphasize that the law-maker is free to give any content whatsoever to such rules. They do not, therefore, stress the need for such rules to "fit into" an ongoing, pre-existing order.

This difference in perspective also accounts for the differing emphasis placed on *the role of government and legislation*. Those who hold that there is pre-existing order tend to advocate a stabilization role for government. Government action, on this view, should augment an already pre-existing order and ensure that such an order is stabilized. Those who hold to the view that order must be generated argue that there is a much larger role for

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<sup>63</sup> At the foundation of this difference in perspectives is perhaps an even more fundamental disagreement over the nature of thought and mind itself. The latter view seem to be most compatible with the view that the fundamental basis of thought is propositional, while the former seems to be in accord with thinkers who hold that propositions are merely approximations — abstractions — to other, more complex and fundamental, processes constituting thought and mind. This difference might go some way to explaining why the latter view stresses language, while the former view tends to stress performance. For a balanced view of the debate in this area, see Dennett (1987), while for a more combative vision, see P.M. Churchland (1989).

government action. On this view, government action is a creator of order and need not necessarily mesh with ongoing rules of conduct.

This is intimately related to the different view each perspective has concerning the principle of the *Rule of Law*. A view which stresses an ongoing, pre-existing order will desire a Rule of Law model which can accommodate the rules of conduct which individuals are already presumed to be obeying. Thus, there is an emphasis on the *abstractness* and *negativity* of rules (so as to accommodate the different particulars that might be present within the rules of different individuals) and the regularity of rule-makers (so that individuals are not directed from "above" but rather guide their own conduct using abstract rules). The underlying idea is that the Rule of Law will *facilitate* rule-following by providing an externalized and articulated institutional framework which can be used to resolve disputes between individuals following different rules. A view which stresses that order must be generated will desire a Rule of Law which facilitates the generation of order. It tends to focus on the question of who is authorized to create order and is less concerned with whether the acts of creating order will cause disorder to individuals following their own rules of conduct (since, by assumption, this is not the case). Finally, such a vision of Rule of Law will stress that law-makers are not restricted in their choice of the content of legal rules.

There are three implications which flow from these differing conceptions of the Rule of Law. First, this difference in focus leads to a different emphasis on *the relative importance of abstraction and concreteness*. Those that emphasize the existence of a pre-existing order focus on *how* this order is generated, and this leads to a stress on the importance of obeying (often unarticulated) *abstract* rules of conduct. Those that emphasize that order must be generated and imposed focus on concretes, on particular details which give the imposed order its particular character according to the concrete characteristics desired by its designers.<sup>64</sup>

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<sup>64</sup> This is, I would argue, a central element of Dworkin's early criticisms of Hart's theory of positivism (Dworkin 1977). Dworkin was arguing, in effect, that Hart ignored the importance of abstraction in legal reasoning (which, though not framed in these terms, is a pervasive theme in Dworkin's more recent writings (Dworkin 1985; 1986)). This might also be used to illuminate Dworkin's distinction between rules and principles. Dworkin claimed that rules apply to situations in an all-or-nothing fashion, whereas principles apply by matters of degree. This is, of course, only correct if by a rule Dworkin is referring to a very *concrete* articulation. Otherwise, rules can have varying degrees of abstraction. As rules become more abstract, they come to be based more and more upon matter-of-degree type closures, and hence apply only as a matter-of-degree (a matter of weight). Hence, unless Dworkin restricts his notion of "rules" to the set of very concrete and detailed articulations of regularities, he will find that not only principles, but also rules, can have a matter-of-degree

Second, there is a differing emphasis on the importance of *the negative rule / positive rule distinction*. A view which emphasizes a pre-existing order asks the question of which type of rule is most effective at sustaining this ongoing order. This leads to the insight that in situations of social complexity negative rules are often a more effective tool for guiding individual conduct than positive rules, as they allow individuals to continue to decide which particular conduct they will perform. A view which stresses the generation and imposition of order, and which is unconcerned with this distinction, does not stress the operation of mechanisms which are concerned to filter out positive rules of conduct, and hence such a view is relatively more amenable to the use of positive rules. An additional reason for such a bias flows from the belief that order cannot be generated solely from prohibiting actions, i.e. if there is no pre-existing, ongoing order, and order needs to be generated, something must be *done* — positive acts must be performed — to create order.

A third and final distinction flows from the difference in emphasis on the importance of negative rules: *the difference between duties and aspirations*. The view which recognizes a pre-existing order, and has an insight into the difference between negative and positive rules, will place an emphasis upon the distinction between duties and aspirations. Such a view will argue that legal mechanisms are for the most part concerned with duties in the form of negative rules which facilitate decentralized individual conduct and sustain an ongoing order. This view argues that the “narrowing down” role of negative rules is conducive to the preservation of an ongoing, decentralized, social order. It also argues that the conduct-prescribing role played by positive rules is more amenable to aspirations than duties, for positive rules substantially reduce individuals’ ability to act on their own judgment, and hence this view advocates only a minimal role for such positive rules. On the other hand, the view which believes that order must be generated and imposed does not recognize the importance of the negative rule / positive rule dichotomy and hence does not stress the connection between negative rules and duties and positive rules and aspirations. This view, because its focus is on generating order, can lead to a vision of law in which positive duties play a central role. Indeed, because this view does not recognize the existence of an ongoing order, it has an implicit bias towards rules which prescribe conduct and hence generate “order” (where, by assumption, none existed).

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weight. The essential difference between rules and principles, then, is the degree of abstraction of each. As rules become more abstract, they apply more as a matter-of-degree and to a lesser degree as all-or-nothing.

To conclude this section, it should be emphasized that the difference in perspective which I have been elaborating is never as clear cut as the discussion above has perhaps made out. This distinction is, in practice, a matter of degree and there is certainly an element of both perspectives in many, if not all, theories of law, positivist and non-positivist alike.

This being the case, it does not change the fact that a discernible difference can be observed between Hayek and Fuller and their positivist critics. It is of the utmost importance to understand this distinction and to mull over its numerous implications. It is especially important to be cognizant of this difference in perspective when turning to a consideration of a Hayekian and Fullerian vision of law. As that is the task of the next section, I will reiterate one last time: Hayek and Fuller presuppose and emphasize the existence of a pre-existing regularity in social interaction. Their aim, then, is to spell out a vision of law which is compatible with this already existing and ongoing social order.

## 22. A general overview of Hayek's and Fuller's notions of law

So what, then, are the features of legal mechanisms to Hayek and Fuller? This section focuses on Hayek's and Fuller's theories of law, and tries to characterize the properties they believe are typical of legal mechanisms. The discussion then turns to an important element of Fuller's legal theory — the distinction between moralities based on duties and those based on aspirations — and ties these into the discussion of this, and previous, chapters.

What, then, are the Fullerian and Hayekian notions of law? To Fuller, law is "the enterprise of subjecting human conduct to the governance of rules" (Fuller 1969, 74). Law come into existence under two conditions: (a) when acts conform to the general principles of the "inner morality of law"<sup>65</sup> and (b) when acts implement "the interests...of society generally" (Fuller, 1969, 207). In other words, rules which implement the "specific ends set by the lawgiver" would not be legal acts but, in Fuller's words, merely the "directives of a managerial system" (Fuller 1969, 207). Law, "in the...sense of rules of conduct directed toward the citizen" must be distinguished from "government action generally" (Fuller 1969, 169). Legal acts, then, are solely those which conform to his principles of legality *and*

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<sup>65</sup> There are eight conditions to be satisfied by acts claiming to be legal. Such acts must exhibit a "sufficient" degree of (i) generality of reference, (ii) promulgation, (iii) prospectivity, (iv) intelligibility, (v) lack of conflict between the actions the rules engender (sometimes somewhat misleadingly termed "non-contradiction"), (vi) possibility of obedience, (vii) constancy over time, and (viii) congruence between official action and declared rules (Fuller 1969, 39).



which implement widely held values.<sup>66</sup> On this view, then, an arbitrary dictator who used rules to implement her/his will would not generate legal acts *unless* she/he acted regularly *and* at the same time implemented widely held values. Rules which do not satisfy the regularity/value criteria might be, in some sense, authoritative,<sup>67</sup> but this is not the same as being legal in Fuller's sense of the word.

Hayek's distinction is similar. A simplified form<sup>68</sup> of Hayek's argument is that legal acts are those in conformity with principles very similar to Fuller's principles of legality. Legal acts implement general, abstract values using general, abstract rules. Law is the set of abstract rules which implement these general values. Which type of acts, then, are considered legal in a Hayekian framework? Only those acts which conform to Fuller-like principles of legality *and* which implement abstract values and not concrete goals. To Hayek, "the law or the rules of just conduct serve not (concrete or particular) ends but (abstract and generic) values" (Hayek 1976, 14).<sup>69</sup>

What, then, underlies Fuller's claim (echoed in many of Hayek's writings) that the "law furnishes a baseline for self-directed action, not a detailed set of instructions for accomplishing specific tasks" (Fuller, 210)? Why are Fuller's and Hayek's notions of law predicated on the implementation of general values? And why would mechanisms which implement concrete goals necessarily infringe Fuller's principles of legality?

Under Hayek's and Fuller's theories, legal acts are restricted to those that implement general values. What does this imply? Under a Hayekian notion of law,<sup>70</sup> law exists only

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<sup>66</sup> This second condition also seems to answer the objection to Fuller's theory that his view of law implied thousands of different legal systems in a single country. If these systems of rules implemented values which were applicable to limited societies, they would not be legal under the view advanced here. On this view, it is the properties of goals which are advanced which are used to distinguish legal and other rule-based systems.

<sup>67</sup> They might, for instance, have political authority.

<sup>68</sup> For a more detailed consideration, one should turn to his discussions in *The Constitution of Liberty* (1960, 131-249), and more generally, *Law, Legislation and Liberty* (1973; 1976; 1979).

<sup>69</sup> It would be incorrect, then, to claim that Hayek differs from Fuller in that Hayek claims that law has no purpose, while Fuller is explicit in his claim that such a purpose does exist, for both are claiming that an *abstract* purpose does exist. Hayek in effect denies that law has a *concrete* purpose, but affirms that it does have an *abstract* one: "to assist the constant re-formation of a factually existing spontaneous order" (Hayek 1976, 60). Fuller claims that the purpose of law is to subject human behaviour to the governance of rules, contrasting this with the governance by arbitrary will which lacks such regularity. Hayek claims that "the law serves, or is the *necessary condition for*, the formation of a spontaneous order of actions". It serves "the preservation of an enduring system of abstract relationships, or...[an] order...with constantly changing content" (Hayek 1973, 112, my italics) and "in the usual sense of purpose, namely the anticipation of a particular, foreseeable event, the law indeed does not serve any purpose, but countless different purposes of different individuals....in the ordinary sense of purpose law is therefore not a means to any purpose, but merely a [pre]condition for the successful pursuit of most purposes" (Hayek 1973, 113).

<sup>70</sup> And many others as well. "Efficacy" is an implicit or explicit pre-condition for the existence of a legal system in many different theories.



where there is “sufficient” regularity to sustain it. It is important to emphasize this point, for this requirement effectively restricts the ability to act in a legal manner. A dictator, if willing to commit their momentary preferences and desires into regularities which others could obey, might implement rules which conform to Fuller’s principles of legality. Would this, then, be sufficient to render these acts legal? Not necessarily. Informing Hayek’s and Fuller’s notions of law is the insight that the implementation of different types of systems of rules necessarily presupposes different implementation mechanisms associated with each type of rule system. Associated with this is the argument that rule systems implementing general values will require different implementation mechanisms than will ones implementing concrete goals. The Hayekian contribution to this argument is the claim that mechanisms implementing concrete goals will not be able to achieve “enough” regularity to be considered legal in the sense of conforming to the principles of legality. In essence, under a Hayekian theory legal acts must conform to the principles of legality *and* implement general, abstract values. The claim is that if one desires to implement rule systems based on concrete goals, one will not be able to satisfy the principles of legality. In other words, the implementation effects of mechanisms which put into effect rule systems based on concrete goals are in conflict with the principles of legality.

Note that there are at least three different meanings which could be attributed to the term “general, abstract values”. First, one could be referring to the mode of expression of these values. I would argue that this is not a sufficient condition to express what Hayek and Fuller have in mind, for expression may be abstract and yet may pick out very concrete space-time details.<sup>71</sup> Second, one could be referring to rules which are abstract and general in the sense of the inclusiveness of their space-time reference. Under this definition, a rule is abstract if it refers to a relatively large sector of space-time. Third, one could claim the term “general” refers to values which are held in common (“generally held”) by the individuals of a society. Hayek argues that in a complex society these values coincide with relatively abstract values, for in such a society it is abstractions which are held in common (while particulars

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<sup>71</sup> This argument is similar to that of Leoni (1961, 77-96) in which he argues that the “certainty” of the law is manifested in two ways: first, in the form of expression (being mainly written or oral), and second, in the constancy of the governance of the rule. Leoni argues that most jurisprudential arguments which talk of the certainty of the law are referring to it being as written (or oral), and hence are referring to the precision of meaning which arises from externalizing knowledge in articulated form. From the perspective of the constancy of the governance of rules, however, this does not necessarily make law more certain, for written rules, if repealed soon after enactment and replaced by other written rules, are not certain in the sense that individuals know which rules are going to govern their affairs.

differ across individuals).<sup>72</sup> Moreover, if the mechanisms described in the previous chapters for generating and supporting rule-based conduct governance are implemented, the values which will be embedded in rules will necessarily be abstract.<sup>73</sup>

After examining the use of these terms, it seems that Hayek is using the second and third meanings, while Fuller is using the third. But appearances can be deceptive. If Fuller is arguing that autonomous (decentralized, self-directed) action is an integral part of law, and this implies that he holds the mechanisms which support such actions as a value, then he must also be arguing that rules must be abstract in the sense of their space-time reference. In other words, Fuller must be referring to the second and third definitions above. If this is correct, how do Hayek and Fuller expect legal mechanisms to filter out values which are not sufficiently abstract (in the sense of their space-time reference and in terms of being widely held across society)?

Consider the claim that legal mechanisms are limited to those which implement abstract values. On this view, legal mechanisms may be seen as filters which attempt to eliminate the implementation of specific goals. Why would this be the case? Fuller's main argument for this proposition seems to be that the "purpose" of law is to provide the foundations for autonomous action. That is, the law should strive to support autonomous moral agents, whose actions are based on their own decisions and who, in turn, assume responsibility for their acts. This is an explicitly moral argument. But consider for a moment the grounds of this belief. If one were to ask *why* individuals should be autonomous agents, not all the arguments are explicitly moral. In fact, one of these is Hayek's argument concerning the informational requirements of governance in a complex society. Hayek and Fuller coincide on this point: both assume that the law should strive to provide support for regularity through the governance by abstract rules. If one desires to preserve complexity, one must adopt the mechanisms which support it. To put it another way: their argument is that *if* one desires a complex, *Gesellschaft*-type society, *or* if one desires certain aspects of this form of societal relations, *then* one must adopt mechanisms compatible with this goal. Hayek's and Fuller's argument is that for such a society to be achievable and sustainable, *their* notions of

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<sup>72</sup> See Hayek (1976, 1-30) for his arguments to this effect. It is of the utmost importance to keep in mind that the term "abstractions" in the paragraph above refers to *performative* abstractions, and as such is not merely referring to a quality of concepts or their articulations. It is the abstract capacities of individuals, as manifested in their performance, which this thesis argues are shared in common across individuals.

<sup>73</sup> Relative to, of course, the degree of shared particularity found in the environment to which these mechanisms are applied.

law would have to be accepted. I would argue that the desire to sustain the structure of a complex society is intimately linked with Fuller's advocacy of his moral view of the desirability of autonomous moral agents. Furthermore, an argument might be made that, contrary to the widely held perception of Fuller as primarily concerned with the morality of law, Fuller is equally interested in the compatibility of competing decision mechanisms in different performative and informational environments.<sup>74</sup>

Now turn to Hayek. One of the principle Hayekian justifications for the claim that legal mechanisms are limited to those which implement abstract values would be that mechanisms which implement particular goals are not informationally and performatively capable of sustaining a society where individuals act under their own judgment, nor a complex, *Gesellschaft*-type society. The claim would be that mechanisms implementing particular goals cannot generate objective judgments (in the sense of based on shared criteria) and hence are not able to guide actions in complex environments<sup>75</sup> nor contribute to the resolution of conflict in an objective way. The attempt, then, to implement particular goals would, in situations of complexity, be accompanied by a change in the authority structure of society. Why would this be the case? The fundamental reason for this is that concrete rules are not, on their own, capable of guiding decentralized individual conduct in all of the particular environments of a complex society. There would therefore be a need to make an increased number of references to authorities who would have to dictate the conduct to be performed in each of these different environments. But such an increase in authority references would constitute a transformation of the authority structure of society, and it is this transformation, from abstract social relations capable of supporting a *Gesellschaft*-type society, to concrete relations which cannot, which Hayek opposes.

A Hayekian would argue, then, that mechanisms implementing concrete goals cannot generate justifications which are universalizable, consistent or coherent (UCC) *across* the individuals of a society (i.e. commonly shared and, in the usage of this thesis, objective), and hence that if there is a general desire for action to take place, there will be the need for smaller, more restricted, groups to supply concrete goals to be implemented. On this view, restrictions on reasoning are viewed as filters which attempt to eliminate particular, concrete goals from legal arguments and their justifications. These filters try to ensure that the

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<sup>74</sup> For the evidence to support this, see for example Fuller (1964, 168-181) and more generally *The Principles of Social Order* (Fuller, 1981).

<sup>75</sup> Basically, in environments in which concrete aims are conflicting.

makers of the judgment do not implement concrete (person-specific) goals when deciding cases.

This does not mean, however, that the UCC filters are sufficient to ensure that judges as a group do not impose their own (group-specific) abstract values on others. But if, in addition to the UCC filters, judges strive for an impartial spectator perspective (and hence for abstract rules which can serve as justifications *across* minds, *including* individuals who are *obeying* the rules) there is a possibility that the justifications might be objective (i.e. based on shared criteria). It is the combination, then, of the filters for concrete goals (the UCC criteria) and the filters for group-specific abstractions (i.e. the impartial spectator criteria) which leads to the *possibility* of objective abstract judgments.

This discussion has only emphasized some of the general filters associated with legal mechanisms. There is no doubt that these are manifested in a variety of ways and through a diversity of institutional structures. One which merits a brief mention is the institutional structure of a hierarchy of review courts, with an increasing number of jurists contributing to judgments at each higher level. This merging of a “democratic” principle with judicial decision-making also attempts to ensure that idiosyncratic, person-specific judgments and justifications do not emerge in legal decisions by forcing a justification to seek wider support. One function of this continual check on judicial decisions, a form of error-correction mechanism, is to produce consistency of decision and filter out idiosyncratic judgments.<sup>76</sup>

Flowing from this discussion of legal filters is one further property which has been discussed at some length in this thesis — the negativity of legal rules. Briefly put, legal mechanisms generate rules that are primarily negative in the sense that they impose no duties on anyone, and in the sense that they express for the most part prohibitions on action. As has been argued in previous chapters, negativity arises as a *by-product* of the application of the various filters on reasoning. It should also, however, act as an explicit filter over potential rules. There are, of course, exceptions to this, and they will be discussed in the section which follows. For the moment, though, the important point which should be emphasized is that these restrictions on mechanisms — UCC, the impartial spectator perspective, and the negativity of legal rules — are in some sense fundamental to the definition of legal mechanisms. Each of these acts as a filter over particulars, and each

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<sup>76</sup> How well it does this *in practice*, or how much wider is this support, are, of course, different questions.

represents a restriction on the forms of action which can be used to guide individual conduct and at the same time sustain the complexity of a modern society.

### 23. Positive obligations and legal mechanisms

The section above noted that legal mechanisms do generate some positive obligations. This is an important point to address, for the predominant negativity of rules of conduct is an essential element of a mechanism model of law. Consider, then, the following: if this theory stresses that the abstract rules of conduct governing an abstract society are for the most part negative, what role do positive rules, such as some of the rules of contract, play in this theory? Are they considered not to be a part of law? And, if they are, is it not an exaggeration to argue that positive obligations do not play an important role in law?

It is of course true that positive obligations do have an important part to play in legal mechanisms. The goal of this work is, however, to emphasize the *abstract* elements of the *minimal* necessary conditions for the establishment of an abstract society, and the mechanisms which support such conditions. It is true that some minimal obligations for social life (and life itself) are conduct-requiring — this is not to be denied — and, in at least some cases, it should be argued that they are, in this way, necessary conditions for the advancement of complexity and a division of labour and knowledge. But it is not the aim of this thesis, nor is it one of its implications, to deny this. Rather, this work calls attention to the matching which takes place between a form of obligation and the mechanisms which ensure it is satisfied and sustained over time. The argument of this thesis is that different forms of obligations can require different mechanisms to support them, and that this should be taken into account when considering issues of conduct governance. In particular, it should be acknowledged that in situations of increasing complexity, positive, transfer, obligations becoming increasingly difficult to fulfil solely under the governance of abstract rules, and that this implies that the mechanisms which support transfer rules have different capabilities from the ones which support governance by abstract rules of conduct.

None of this undermines the importance of positive obligations in a Hayekian legal theory, but it does restrict the role which this type of obligation can play in sustaining a complex, abstract, society. This thesis argues that the positive obligations which underlie the minimal conditions for life, and social life, do have an important role to play in providing a foundation for more abstract forms of social relations. These conditions are



closely related to obligations which exist where *concrete* relations between individuals are presumed to exist. Thus, positive legal obligations might govern situations where (a) concrete relations exist between intimates (i.e. duties to children, spouses, etc.), (b) concrete relations have been established by one's previous actions in areas of life and death (i.e. duties falling upon doctors) or (c) concrete relations have been entered into by agreement, though the *specific* obligations may not have been agreed upon or even considered (i.e. obligations under contract).<sup>77</sup> Contractual obligations represent a particularly interesting example of the limitations placed upon positive obligations by legal mechanisms.<sup>78</sup> For an obligation to exist in contract, there are (generally speaking) a variety of what might be called formation tests which must be satisfied. These tests specify the forms of conduct and the states of affairs under which the legal state of contract shall exist. These are bound by a variety of negative rules which exclude certain forms of obligation (for example, those which are entered into by those lacking legal capacity). Once the parties have managed to satisfy (or at least, not violate) these various filters, a state of contract is deemed to exist. Within this state of affairs, a concrete obligation exists between the various parties. Some positive obligations do exist once this state exists — omitting to act *is* considered to be in many cases contrary to one's assumed obligation. In addition, of course, there exist negative rules which prohibit certain unacceptable forms of carrying through on one's concrete obligation.

What *limitations*, then, do legal mechanisms place on the positive obligations of contract? First, and most importantly, the positive duties which are established are the result of the conduct *of the parties to that contract*. Thus, positive obligations are established through decentralized acts. Furthermore, one must pass through various formation filters to enter into this state, and one's ability to assume obligations can be negated by a variety of pre-conditions. It is the conduct of the parties and an observer's interpretation of that conduct which determines who desires to be so obliged. Therefore, one is able to in large part choose whether or not one becomes bound by such obligations (though the *particular* obligations one must honour are not necessarily a matter for individual choice, nor are the accepted forms of conduct which constitute the formation filters). Moreover, even after one

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<sup>77</sup> There are also, of course, positive obligations which arise under governmental mechanisms. The relationship between mechanisms of government and positive obligations will be considered in another context in a later chapter.

<sup>78</sup> An excellent reference in this area is Treitel (1987).

has passed through these filters and assumed a concrete obligation, one still retains the choice of the manner in which the obligations will be fulfilled (though if the manner deviates in such a way as to substantively undermine the obligation, a more concrete specification — a more specific performance, if you like — might be required). Finally, legal mechanisms only enforce these obligations when they are called upon to do so. The decision, therefore, to enforce an obligation rests with one of the contracting parties. All of these restrictions imply that legal mechanisms impose limitations upon positive contractual obligations with the purpose of ensuring that in the *abstract* case the obligation has been entered into through the decentralized choice of *individuals*. It is the existence of these implicit, and other more explicit, filters which rule out certain forms of obligations, which leads this thesis to emphasize the importance of negative rules to legal mechanisms. It is these negating filters, then, which are central to legal mechanisms and which serve to promote decentralized individual conduct governance using abstract rules.

#### 24. Conclusion

The central argument of this chapter is that Hayek and Fuller ground their legal theory on a conception of the sources of social order which is fundamentally different from Hartian legal positivism. This difference in perspective results in a differing understanding of the causal relationship between law and society. Hayek and Fuller continually emphasize a pre-existing, ongoing social order, in which individuals orient their conduct using abstract rules of conduct. To these thinkers, law is a mechanism which *facilitates* individual interaction by providing an articulated institutional framework for resolving conflicts between the competing rule-sets that different individuals are obeying. The “purpose” of law, on this view, is to regularize conduct, and this can only be achieved if it is acknowledged that individuals are *already* following rules of conduct. Given that individuals are already following abstract rules, Hayek further argues that there is an intimate relationship between individuals being guided by abstract rules of conduct and the resultant form of society which such conduct is capable of producing. His argument is that individuals — *including* law makers — must act regularly by following abstract rules based upon abstract values if the individuals are to be able to act autonomously and adjust to complexity, and if conflicts which arise between them are to be resolved in an objective manner.

Why, then, must law-makers act regularly? The argument is complex, but it can be distilled into the insight that an individual who must implement someone else's particular goals cannot act with the regularity required by other autonomous individuals. Individuals have in some sense a privileged access to their own goals, but not to the goals of others. If individuals must refer to others to find out which concrete goals are to be implemented, this means not only that individuals are not acting in conformity with general rules based on general values<sup>79</sup> and hence that they are not obeying rules held in common, but also that the societal structure within which interactions take place is of a kind different from one based on abstract rules implementing general values. Put crudely, in a complex society, as the rules governing interactions become more and more concrete and as they move towards the implementation of concrete goals, spontaneous order becomes transformed into organizational order, *Gesellschaft* becomes a particularly restrictive form of *Gemeinschaft*, and decentralized autonomous action is replaced by actions directed by the goals of particular individuals and groups.

Hayek's argument, then, consists of two strands. The first strand argues that if "individual freedom" and "individual responsibility" are to have content, and if individuals are to be facilitated in their adjustments to complexity and in the objective resolution of disputes, then subjecting individual conduct to the governance of rules must be a value. His argument is that the only types of mechanisms which can generate and sustain this type of society are those which implement relatively abstract systems of rules *and* "goals" (values).

The second strand of his argument focuses on social life within the context of a complex, abstract society. The claim is that *if* one desires an abstract, *Gesellschaft*-type society, *or* if one desires some of the properties of this societal type, *then* one must adopt mechanisms which are compatible with these goals. Thus, the argument is that there is an intimate relationship between the degree of abstraction of rules of conduct and the goals they implement, and the resulting order of society and authority which emerges under these rules. It is claimed that mechanisms which implement abstract rules are associated with *Gesellschaft*-type societies, while mechanisms which implement concrete rules are associated with particularly restrictive forms of *Gemeinschaft*-type societies.

This chapter has traced out the outlines of an alternative theory of law based upon the work of F.A. Hayek and infused with some of the insights of Lon Fuller. This theory focuses

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<sup>79</sup> For if the values were general enough to allow individuals to pursue their own goals rather than the goals of others, individuals would not have to refer to others for their goals.

on the properties of legal mechanisms, and contrasts itself with positivist conceptions which emphasize the structure of authorization as somehow central to all that is legal. By contrast, I argue that the distinguishing feature of legal mechanisms is that they attempt to implement predominantly negative abstract values using a variety of rule-based filtering mechanisms.

If this is the case, where does this take the discussion? There are three different directions. First, I turn to a more detailed examination of this mechanism model of law and its implications for the principle of the Rule of Law. Next comes an examination of the feasibility of distributive justice. This includes a brief look at Hayek's critique and a re-evaluation of its consequences. Finally comes a chapter comprised of an analysis and restatement of Hayek's much neglected and often misunderstood theory of mind. This theory is strikingly contemporary, and many of its insights anticipated present developments in the philosophy of mind by a matter of decades. It is a theory based upon the insights into the process of abstraction and the manner by which abstraction is generated, and as such is of fundamental importance for a theory which emphasizes the generation, application, and evolution of abstract rules of conduct. This final chapter, then, focuses on the theory of mind which provides the foundations for much of the theory of law outlined in this work.

## Governance by Abstraction

### Law, the Rule of Law, and abstract society

#### 1. Introduction

The arguments of the previous chapter were aimed at demonstrating that governance by abstract rules of conduct has a crucial role to play in supporting abstract, complex societies. That chapter sketched the rough outlines of a Hayekian approach to law under what might be called a mechanism model of law. This chapter extends these arguments, and investigates the conceptual framework within which legal mechanisms operate. This entails an investigation into the ideas underlying the principle of the Rule of Law. This chapter examines the connection between this principle and the concepts of justice and coercion, and focuses on the roles these concepts play in supporting abstract social relations.

It should be stressed at the outset that the discussion of this chapter will proceed at a very general level. There is, consequently, very little in the way of a discussion of the concrete details of how the conceptual analysis of this chapter is actually manifested in institutional practice. The primary justification for this choice of emphasis<sup>1</sup> is the chapter's claim that much of legal theory, and the positivist school of thought, in particular, have ignored the *foundations* of institutional practice, and have instead simply assumed that the existence of *some* foundation, which allows certain institutional practices to have their *specifically*

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<sup>1</sup> A secondary justification for this emphasis would be that there is a substantial literature that focuses on the institutional aspects of this principle. Dicey's analysis (1959, 183-414) remains a classic, and Hayek's own conception of the Rule of Law can be viewed, in part, as a restatement of Dicey's earlier work. Hayek's discussion, in *The Constitution of Liberty* (1960, 131-249), and the large number of references therein (1960, 449-500), provide a survey of the issues, and includes a theoretical analysis of the principle of the Rule of Law, an examination of the conceptual framework which this principle presupposes, and some interesting, if controversial, historical insights into its development. Fuller's discussion of his "inner morality of law" provides an excellent overview of the fundamental principles underlying the Rule of Law (Fuller 1969). His discussion focuses on the Rule of Law's theoretical aspects and on the problems involved in its implementation. Of the numerous contemporary discussions, see, for example, Raz (1979, 210-229) or Walker (1988), although as the later sections of this chapter point out, the former's examination is dependent upon certain theoretical presuppositions which render his analysis of questionable value.



*“legal quality”*, is a matter of “social (or institutional) fact”. This indifference to the foundations of law and legal theory implies that the positivists are interested in a distinctly different set of issues and questions from the ones addressed in this thesis. Positivists presuppose the factual nature of the foundations upon which their theorizing rests, and then proceed to work *within* the framework that such presuppositions underlie. Simply put, they are *presupposing* that a “legal quality” exists as a matter of fact, and then examining how such a quality manifests itself in practice. This thesis, on the other hand, turns the factual nature of the foundations of law and legal systems into a question, and examines how the quality of being legal arises in the first place. Consequently, the central question which this thesis addresses is not concerned with examining a certain set of institutional practices to see how they affect law and legal systems, the existence of which (or lack thereof) are simply presumed to be a matter of fact. Instead, the issue of decisive importance, from the point of view of this thesis, is *how* this “matter of fact” *is achieved and maintained*.

This thesis argues that what it terms the “legal quality” arises from acting in certain ways, i.e. in ways which are governed by certain fundamental mechanisms, as discussed in the earlier chapters of this thesis. It is the operation of these mechanisms which provide the framework upon which law rests, and it is these same mechanisms which are simply presupposed to exist by much of traditional legal theory, but which are subject to little, or no, detailed scrutiny. My view is that this blindness to the foundations of law and legal order can be summarized in two critiques of the implicit presumptions which are manifested in the Hartian positivist theory of law, both of which are expanded upon in the later sections of this chapter. First comes the idea that this vision of law has a tendency to assume what might be termed a “premature factuality”. “Social facts” exist, but little attention is paid to the foundations upon which these “facts” are intimately dependent. Second, and related to this, comes the argument that the Hartian positivist perspective on law has an epistemological bias towards the articulated and the concrete, and that it lacks an insight into the importance of abstraction for issues of conduct governance. This chapter will argue that both of these predilections lead positivist legal theory, and those theories of law which base their arguments on similar views, down a path of conceptual analysis which rests on a comprehensive misunderstanding of the foundations of legal order.

The plan of this chapter is as follows. First, I will consider the ideas which underlie the principle of the Rule of Law. This will involve an investigation into the way that individuals govern their own lives. Next comes a discussion of the rationale behind the Rule of Law and

its implications for social conduct governance. This is followed by the examination of two concepts which in an abstract society are intimately connected to the principle of the Rule of Law: the concepts of justice and coercion. Once this is completed, the chapter turns to an examination of the inter-relationship between the Rule of Law, justice and coercion which lies at the heart of this chapter. Finally, the chapter concludes with an analysis of what is probably the dominant theoretical perspective on law and the Rule of Law, the positivist model, and contrasts it with the theory here developed.

## **2. A shift of perspective: law as a conflict-resolution mechanism**

The last chapter focused on conduct governance by abstract rules and its connection to the sources of societal order. It also examined one element of the role played by law — the facilitation of regularity — and looked at various filters over potential rules of conduct. The previous chapters have argued that these filters aim to restrict the implementation of concrete goals and eliminate rules of conduct which do not enhance regularity. This chapter represents a change in perspective, away from the sources of, and pre-conditions for, abstract order and the role abstract rules play in supporting an ongoing abstract society, and towards the resolution of conflicts between the actions of different individuals. With this goal in mind, this chapter also introduces one final filter through which rules conducive to, and supportive of, an abstract society must pass: the *minimum coercion filter*.

This shift in perspective might seem to be a rather substantial change of focus. Why, one might ask, is this necessary? Up to now, the idea that conflict exists has been implicitly assumed away by the very nature of regularity. The previous chapter in a sense assumed away the problem of conflict and provisionally assumed that it had either been resolved or did not exist. It is time, however, to turn the focus of attention to the question of *how* regularity is maintained by explicitly assuming that different individuals will be acting in such way that conflicts arise between them. Law, in its role as a promoter of regularity, implicitly acts as a mechanism whereby conflicts between different forms of conduct are resolved. The time has come, then, to emphasize law's role as a conflict-resolution mechanism.

The idea that law is a mechanism for resolving conflict and hence promoting regularity is intimately related to an important principle, the concept of the Rule of Law. This principle imposes two requirements upon acts which make a claim to being specifically legal. First

are its minimal conditions, which are those conditions which acts must necessarily satisfy to have a “legal quality”. In this work, these are represented by the requirements outlined in the previous chapter, i.e. the minimal requirements imposed by subjecting individual conduct to the governance of rules, viewed from the perspective of the minimal necessary requirements for the existence of law. Second are the aspirational elements of the principle of the Rule of Law. These are the requirements towards which one ought to strive if one wishes to improve upon (or perfect) the enterprise of subjecting individual conduct to the governance of rules.

Thus, in this work the principle of the Rule of Law imposes both a minimal criteria for the identification of law (i.e. for what the law *is*), and an aspirational aspect, which governs the sphere of what the “legal quality” *ought* to aspire to be. This is quite different from other studies of this principle. Typically, studies of the principle of the Rule of Law focus solely on its aspirational aspects.<sup>2</sup> In other words, the principle of the Rule of Law is treated *solely* as a normative ideal. As I shall argue at greater length towards the end of this chapter, this is a mistake. Studies which treat the principle of the Rule of Law solely as a normative principle simply presuppose that legal authority exists, independent of any specifically legal mechanisms associated with such authority. The principle of the Rule of Law is then treated as a normative filter over *pre-existing* legal acts.<sup>3</sup> This implies that legal acts are identified using criteria which are *different* from the ones manifested in the principle of the Rule of Law. I will argue that such a separation is based on a mistake, and hence is not the approach taken in this thesis. The principle of the Rule of Law *does* provide an ideal towards which the law should strive, but that is not its only contribution. Instead, this concept also provides the foundation for the minimal conditions for the existence of law, and the mechanisms under which acts are identified as specifically legal.

Thus, the normative, aspirational, aspect of this principle is the idea that regularity in society *should* be promoted and facilitated using abstract rules which are themselves stable over time. The minimal conditions aspect of this principle is based on the argument that if social regularity is to take the form of abstract social relations, then social conduct *must* be guided predominantly by relatively unchanging abstract rules. This is an important point.

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<sup>2</sup> Hayek is not immune to this, for much of his discussion of this principle explicitly focuses on the specifically moral aspects of this notion. See, in particular, his comments in *The Constitution of Liberty* (1960, 205-207).

<sup>3</sup> See, for example, Raz’s claim that “the rule of law is a political ideal which a legal system may lack or may possess to a greater or lesser degree” for a clear statement of this idea (1979, 211).

Discussions of the Rule of Law which focus on its aspirational aspects often presuppose that it is only one value among many.<sup>4</sup> The argument of this and previous chapters in a sense contradicts this. The claim of this thesis is that there exists an intimate connection between the type of mechanism which governs social conduct, the resultant form of society which such mechanisms can support, and the scope of individual judgment and action in such societies. Thus, the argument is not that the Rule of Law is merely a useful tool for achieving social regularity, but also that the Rule of Law is the foundation for, and necessary pre-condition of, the widespread applicability and relevance of many other values with which the Rule of Law is sometimes assumed to be in competition. If this is correct — if the Rule of Law is a pre-condition for many other virtues — this not only eliminates the conflict between it and its supposed competitors, but also heightens its significance and the importance of clearly spelling out the meaning of this ideal.

### **3. The analogy with individual conduct governance**

What, then, are the foundations which underlie the principle of the Rule of Law? The route that I will take in discussing this is a somewhat indirect one, though one which by now should be familiar. The chapter will focus on the general themes underlying the theory of the Rule of Law using an analogy with individual conduct governance, and only much later in the chapter turn to a more detailed discussion of the particulars associated with this principle. This approach has the advantage of providing an insight into the relatively simple and straightforward idea which underlies the principle of the Rule of Law. As well, it furthers my goal of avoiding at the initial stages of the discussion the complexity of the specific details which are associated with this principle.

The discussion begins, therefore, with an examination of how individuals in their everyday lives govern their own conduct. This governance is based on a mechanism similar to the principle underlying the Rule of Law, but more appropriately termed (in this context) “subjecting oneself to the governance of rules of conduct”. Consider, then, the analogy between the principle of the Rule of Law and the way in which individuals govern their own conduct using rules. Recall, for a moment, the discussion of chapter one, concerning the difference between conditional goals, ultimate goals, and values. This is an important

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<sup>4</sup> See Raz (1979, 211, 226-229).

distinction in individual decision-making, for individuals base their own decisions on combinations of conditional (short-term) goals and longer-term goals and values. For the moment, however, I would like to consider only conscious, deliberate, decisions which are made based on conditional and ultimate goals (decisions involving values will be considered in due course). Given these types of decisions, what can be said about individual decision-making and conduct governance in such situations, and how is this related to the ideas behind the principle of the Rule of Law?

Perhaps the most important thing to recall from the discussion of chapter one is the different properties of conditional and ultimate goals. Conditional goals are based to a greater extent on momentary desires and the particular circumstances of the moment. Longer-term goals are in a sense more stable, more enduring, and tend to assert themselves over a wider variety of circumstances.<sup>5</sup> If there is little conflict between one's short-term and longer-term goals, decisions are relatively unproblematic. One simply follows one's momentary desires, and as these coincide with one's longer-term goals, one achieves both in a single stroke. The *difficulty* for individual choice arises when a *conflict* exists between short-term and longer-term goals. In these situations, individuals facing choices must attempt to strike a balance between their competing goals. If one were guided solely by the impulses of the moment, one might not achieve one's longer-term goals. But, if one follows only one's longer-term goals, one would miss out on many of the pleasures of the moment. There is, then, a balance to be struck, and this balance determines how successful one will be at achieving one's short-term and longer-term plans.

Conduct governance from the perspective of decisions based on goals and values is in many ways analogous to the decision-making described above, except for one qualification which is of some importance. It should be pointed out that if one is working under the distinction between "goals" and "values" stipulated in chapter one, it is perhaps in many cases a misnomer to speak of "decisions" at all, for it is not necessarily the case that the values "held" by an individual are consciously known. Rather, they might merely be manifested in the conduct of the individual. If this is the case, individuals' goals, either short-term or longer-term, might be in conflict with one's values, even though this may not

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<sup>5</sup> They are, in this sense, more *abstract* than conditional, short-term, aims. They refer to situations which are less concrete in that longer-term values refer to a longer period of the future and to a greater range of space both of which are, except in their abstract aspects, unknown and indistinct (especially relative to the relatively concrete present).



be consciously known to the acting individuals and hence might not be taken into consideration in their conscious deliberations and choices. This is not to say that in such situations there is a deliberate choice being made to undermine one's values, but rather that when individuals pursue their goals they have the potential of undermining the values upon which such plans of action depend.

How, then, is all of this related to the principle of the Rule of Law? Insofar as individuals make deliberate choices, they are in some respects self-governing, choosing between enduring aims (their longer-term goals) and momentary desires (conditional goals). One effective way of doing this is by following rules. In an important sense, the principle of the Rule of Law is manifested at an individual level by agents' attempts to govern their *own* conduct by abstract rules. The reason for resorting to rules is that one is *limited* in the number of aspects one can consider at any given moment. In other words, over the same time period a *more* complete consideration of short-term circumstances *always* implies a *less* complete consideration of longer-term goals.<sup>6</sup> This "economy of mind" can lead to short-term desires overwhelming longer-term considerations. If, however, one considered the situation in abstract (i.e. not in those particular circumstances) one might have desired the longer-term goals to dominate the desires of the moment. One resorts to rules, then, in order to build in those elements of longer-term considerations one holds to be important. Rules are in this sense one manifestation of longer-term goals. A rule which says "as a rule do X" means that one does not consider all of the circumstances of the particular situation. The resort to rules excludes consideration of some particular circumstances precisely because that is one of the reasons for following the rule in the first place (if one felt that one's momentary judgment were always superior to judgment based on a rule, why resort to rules *at all*?). Rules, then, are a tool that one can use to ensure that one's longer-term goals are respected and given adequate consideration. The underlying idea is that sometimes one's momentary desires are not always consistent with one's longer-term goals, and that if one desires these longer-term goals to be implemented, one must sometimes overrule one's short-term desires.

These considerations hold with even greater force for decisions based on goals and *values*. The idea here is that there exist certain fundamental rules of conduct which have

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<sup>6</sup> This idea is one of the recurring themes of Hayek's work. See, for example, his discussions in *Law, Legislation and Liberty* (1973, 55-71; 1976, 1-30).

evolved to support certain values. This thesis argues that there are evolved rules which support the fundamental obligations which underlie action and social life, and that these should be taken into account when one maps out a plan of action, for they are, in a sense, the pre-conditions for one's ability to make and carry out a plan at all. Individuals might have no conscious knowledge of the roles such rules play in supporting these values, nor even, perhaps, of the values themselves. It might even seem to individuals that certain rules are themselves values, in that they are not means to certain ends but rather seem to be "ends in themselves" (in the sense that it is the fact that rules are obeyed, and not the effects of this fact in particular cases, which is held to be of value). Be this as it may, such rules of conduct, for which the individual might not know the justification, but under which they are capable of acting, are an essential element of social life.

This leads to one final point which is important to keep in mind. In many cases, short-term goals, longer-term goals, and even longer-term values are *not* in conflict. If this is the case, then there will be *no* conflict between one's performance based on short-term goals and one's longer-term interests. Indeed, many short-term acts actively promote one's longer term goals and values and may in this sense be considered to be manifestations of one's longer-term interests. It is, then, *solely* in the case of a conflict between short-term and longer-term interests that one's longer-term goals or values come into play and potentially restrict one's conduct which is predicated on short-term goals and desires.<sup>7</sup>

#### 4. The connection between individual and social conduct governance

The reader might be inclined to think that too much time has been devoted to examining an individual's difficulties in governing their own conduct. Interesting as individuals' self-governance might be, it could be argued that there has been too little time spent examining social governance mechanisms. While this view would be understandable, given the interests and emphasis of contemporary legal theory, it would also be mistaken, for there is an intimate relationship between individuals' own conduct governance and social — institutional — forms. The argument of the previous chapter was that for reasons of evolutionary adaptivity to increasingly complex environments, individuals have, to an increasing degree, resorted to abstract rules of conduct to govern their own conduct. These

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<sup>7</sup> Compare this with Hayek's discussion of the restrictions imposed by the principle of the Rule of Law (1960, 206).

rules are formed within the individuals' own minds by processes analogous to the filters described in previous chapters. Such rules can be generated with the active input of conscious insight, but they can also come to exist without conscious deliberation or design.

It is of some importance to note that such rules assume a rank-ordering (a "weighting") through a complex interaction between the processes ongoing in the minds of individuals and their environments. Indeed, this notion of rank-order is intimately related to a crucial theoretical dichotomy introduced in earlier chapters: the distinction between minimal conditions, and conditions which presuppose that these minimal conditions have already been fulfilled. The argument of previous chapters was that rules of conduct pertaining to minimal conditions have an important role to play in conduct governance, and that the fact that certain rules of conduct are supportive of minimal conditions through the obligations they impose is connected to aspects of their governance properties, including their abstraction and, in situations of increasing complexity, their negativity.

That conduct governance in complex societies must resort increasingly to abstract rules of conduct based on obligations relating to minimal conditions is intimately related to an issue which is sometimes passed over in discussions of conduct governance. This is the question of the severity of the performative requirements of certain mechanisms. Put crudely, and in the context of autonomous conduct governance, a question the individual might ask would be "how hard will it be for me to conform to this governance mechanism, and at the same time retain my autonomy of action?" From the point of view of this thesis, and with respect to deliberate efforts to govern one's own conduct with rules, conduct governance by abstract rules is a complex activity, and is fraught with difficulty. It is not a trivial matter to deliberately subject one's own conduct to the governance of abstract rules of conduct. Indeed, there are certain minimal conditions which must be satisfied before it can be said that an individual *is* acting under the governance of abstract rules. For one to act under the governance of such rules, one must exhibit regularity in conduct over time, and respond in a regular manner to a wide variety of particular situations. To do this requires the exclusion of particulars which do not fall under the general rules which govern one's conduct. Governance by abstract rules, then, implies both that one's conduct is based upon a *filtered* set of aspects,<sup>8</sup> and that this filtering is over *particulars*.<sup>9</sup> Filtering occurs under

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<sup>8</sup> There is an argument which one sometimes encounters which should perhaps be mentioned at this point. This argument claims that all that we know is *necessarily* abstract, for our minds must *always* take in only a part — select aspects — of the complex environment which surrounds us. On this view, the entire line of argument of

mechanisms of mind analogous to filtering mechanisms described in earlier chapters. In this sense, then, the filtering mechanisms examined in previous chapters support and reinforce the minimal conditions necessary for conduct governance by abstract rules. To put it another way, these mechanisms are the means by which one's conduct becomes regular. Conduct governance by abstract rules, then, presupposes the existence and application of these mechanisms.

All of this is intimately related to the issue of social conduct governance. If individuals are attempting to subject their own conduct to the governance of rules, and one aims to ensure regularity in interactions *between* individuals, then abstract rule-based social governance mechanisms should both recognize the ongoing ordering mechanisms of individuals and aim to facilitate their attempts at conduct governance. Social conduct mechanisms are thus not fundamentally different from individual methods of conduct governance, but instead are *extensions* of this form of governance which have evolved in specific institutionalized forms to cope with the specifically social aspects of conduct governance which arise when individuals interact.

Thus, the institutional manifestation of the principle of the Rule of Law is grounded upon the same foundation as individual conduct governance by abstract rules. The concept of the Rule of Law is based upon the insight that decisions based on the desires and knowledge of the moment may not always be in one's longer-term interest. The principle of the Rule of Law is, in effect, the extension of this insight concerning the limitations imposed by our longer-term interests on our momentary desires and judgments into the social sphere. The underlying idea remains the same: momentary judgment must be to some extent restrained by longer-term interests. It now applies, however, to decision-making governing relations *between* individuals.

This change of focus leads to a number of differences between judgment over one's own actions and judgments *between* individuals. The first difference stems from the more

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this thesis is confused, for *everything* that we know is abstract and filtered, in the sense that what we know is always less than the totality of that which "could" be known. This argument, though on its own terms a consistent one, is, from the point of view of being a critique of this thesis, misplaced, for it rests upon a conflation of different senses of the terms "abstract" and "concrete". In this thesis, a rule would be "abstract" or "concrete" depending upon how much space-time it referred to. It would, I suspect, be a mistake, and misunderstanding of the arguments made in this thesis, to dismiss them as being flawed on the grounds that all thought is abstract, or similarly, because all thought is filtered, for the focus of this thesis is upon *relative* abstractness defined in terms of space-time reference.

<sup>9</sup> A point Hayek emphasizes throughout his work. See, in particular, his discussions in *The Sensory Order* (1952, *passim*) and his essay "The Primacy of the Abstract" in *New Studies in Philosophy, Politics, Economics and the History of Ideas* (1978).



systemic concerns of inter-personal conduct governance. For an individual deliberately choosing between alternative paths of action, conflicts can arise between their own short-term and longer-term goals. These goals in turn rest upon the continuing existence of certain pre-conditions — certain values — upon which individual plans depend, and about which individuals may have little or no conscious knowledge. Individual decisions, then, often take these values as a given, and simply presuppose (either explicitly or implicitly) their continued existence. Judgment *between* individuals, on the other hand, should take into account the more systemic aspects of individual judgment, and should attempt to ensure the compatibility of the goals of different individuals with the system of pre-conditions (values) upon which such goals depend.

The second difference which accompanies the change from an individual to a social perspective is a shift in the sources of authority. The limitations of knowledge imposed by existence in a particular space-time implies that individuals will have in some ways a privileged access to some of their own goals. This can lead to difficulties if it results in individuals privileging their own goals over the goals of others (i.e. to them viewing their own goals as having a greater “authority” than the goals of others), for if each individual does this, conflict-resolution *between* goals can become increasingly difficult. Although it may be the case that individuals have, in some respects, a privileged access to their own goals, this privilege does not necessarily extend to the goals of other individuals. Nor does it extend to more abstract values, about which individuals may not even be consciously aware. An inter-personal conduct governance system must take all of this into account, and attempt to integrate the plans of action of various individuals such that these plans are compatible with each other and with the values which are their pre-conditions. A more systemic view of conduct governance implies that individuals’ privileging of their own goals must be restricted to some degree, for there is nothing to say that an individual’s goals will be compatible with the goals of others, or with the values which underlie their own conduct and interaction in a *social* setting.

The question is how a social conduct governance mechanism can manage to accommodate these two differences, and at the same time facilitate the efforts of individuals to govern their own conduct in an autonomous way. The short answer is — by abstracting, and by resorting to the filtering mechanisms outlined in previous chapters to perform this task. It is the process of abstraction which distils the common element of individuals’ concrete goals and generates rules which manifest the commonality between these



differences. And it is by abstracting that insights can be gained into the enduring aspects of a social system. By filtering out particularity, the various mechanisms of abstraction, some of which are outlined in previous chapters, can generate rules which are capable both of governing the conduct of different individuals holding different (individual-specific) goals, and of supporting the general values upon which individual action, and social life, depend.

Note that none of this implies that individuals' goals and values are *unrelated* to those which govern social interactions. But what, then, is the relationship between individuals' goals and values and the social values embedded in the principle of the Rule of Law? What is the source of social authority? The argument put forward by this work is that if abstract social relations are to be maintained, they must be based on abstract rules in the sense of performative regularities which embed the commonality between different individuals' specific goals, and which support the value systems upon which such goals condition and depend. Thus, an abstract society must be based on abstractions which are authoritative to individuals *because* they embed commonly shared goals, values and obligations which individuals instantiate through their conduct. Given the arguments previously presented concerning the restrictions this implies on the rules which implement these goals and values, we can state that these rules will be abstract and predominantly negative. They will not necessarily be articulated or deliberately followed. In an abstract society authority will be implemented through, and supported by, commonly shared and negative abstract rules of conduct. The commonality of these rules flows from their being minimal conditions for social interaction and from their being based on similar (in their abstract aspects) situations and similar processes across minds. As I have argued in the previous chapter, minimal conditions — minimal values and their instantiation in conduct — must be satisfied for individuals to have a social life at all. Social life is not comprised of an accidental throwing together of pre-formed "individuals". Rather, people grow up and become individuals by observing minimal rules of conduct which are essential to their continued existence and ability to interact in society with others.<sup>10</sup> As we shall see, these commonly held minimal obligations are intimately related to the notions of justice and coercion which underlie

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<sup>10</sup> It should be pointed out that this argument is explicitly evolutionary, in that these rules of conduct and their associated values have evolved and in a sense embed the results of evolutionary selection. This is not to argue, of course, that all such rules of conduct and values which have so evolved are *necessarily* well-adapted, for such a determination could not be made independent of a historical analysis which takes into account the environments in which these rules of conduct have operated and hence the roles these rules are capable of playing. Rather, such an argument is merely pointing out that this evolutionary aspect should not be ignored when considering the authoritativeness of particular values, or the function and adaptiveness of rules of conduct.

conduct governance mechanisms that are based on abstract rules of conduct. However, before turning to an examination of this relationship, it is of some importance to consider some of the implications flowing from the claim that these minimal obligations are obligations for *everyone*, and not merely for select groups in society.

##### 5. The implications of governance by a commonly shared code of conduct

One essential idea flowing from the discussion above is that the rules upon which an abstract society are based must be abstract enough to govern *all* persons who are capable of acting in accordance with them.<sup>11</sup> The goal of this section is to trace out one of the implications of this idea for a theory of law.

The idea that the rules of conduct followed by individuals in an abstract society must apply to all is a familiar element of Hayek's legal theory.<sup>12</sup> This idea is echoed in a more general way by Fuller in his examination of the definition of a moral community (1969, 181-184). There, he argues that the notion of a moral community should aspire to apply to all human beings. If these arguments are correct, this implies that social rules of conduct which do not apply to all people capable of obeying them are not necessarily supportive of an abstract society and might in some cases be incompatible with the abstractness that it requires. In other words, rules that govern only specific groups function to support more concreteness that would be required by an abstract societal structure. Such rules, then, might be to some degree incompatible with abstract social relations. Note that this does not imply that concrete rules of conduct are *necessarily* incompatible with the generation and preservation of abstract social relations, for indeed such abstract relations implicitly presuppose the existence of concrete rules of conduct and the existence of concrete

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<sup>11</sup> This is an important qualification, for the argument is not that these rules must apply to everyone regardless of their ability to act in accordance with these rules, but rather that anyone who *can* act in accordance with them should be governed by these rules. This implies that infants, people without the mental capacity to follow the rules, etc., fall under such a qualification.

<sup>12</sup> Although it must be acknowledged that this idea only emerges gradually in his later legal theorizing, and is not acknowledged by Hayek as a substantive change from his earlier views. In his preliminary work on legal theory, *The Constitution of Liberty* (1960), Hayek focused on the abstract properties of law. There he argues that the institutional rules of a legal system can apply differently to different individuals, and that it is not contradictory to the idea of the Rule of Law that different individuals can be governed by different systems of rules (1960, 153-154). In *Law, Legislation and Liberty* (1973; 1976; 1979) however, his perspective has changed somewhat. This work places a greater emphasis on individual-level regularity, on the minimal foundations of legal systems, and consequently much of his discussion presupposes the existence of a system of what he terms "rules of just conduct" which, he implies on numerous occasions, must govern the conduct of *all* individuals (1973, 107, 127; 1976, 15-17).

societies. Rather, the idea is that such concrete rules of conduct are not capable *on their own* of sustaining abstract social relations. If, then, such concrete rules are extended to wider and wider societies, it does make sense to argue that they are incompatible with an abstract form of society in that such concrete rules are not capable of supporting abstract forms of social relations.

There is an important point which flows from this argument. If certain abstract rules of conduct are a necessary condition for the continued existence of social life, then there are grounds for criticizing other rules of conduct which are incompatible with this general goal. This idea is, I believe, the basis for some of Hayek's criticisms of rules and mechanisms which he holds to be incompatible with his vision of the role of legal mechanisms in sustaining the minimal foundations of social interaction. On this view, then, there would be grounds for objecting to exemptions from the minimal rules governing conduct in society (referred to by Hayek as "rules of just conduct") claimed for *any* individual, group or organization, including governmental organizations.<sup>13</sup>

Underlying all of this is the general idea that justifications for action based on some idea of the "public good" are misplaced when they are used to grant immunity from "rules of just conduct". Why would this be the case? The claim would be that a proper consideration of the "public good" would note that the observance of these rules in *every* applicable case more than outweighs the good that might be done in any particular case (save, perhaps, in situations of war and extreme catastrophe).<sup>14</sup> Note that this argument does not claim that *only* "rules of just conduct" should govern the actions of all individuals, groups and organizations, for there could be special rules applying to organizational orders, such as those of government or corporations — although such provisions would be limited to relations *within* such bodies, and should not govern relations *between* these bodies and those external to them. The argument states only that there should never be exemptions from the "rules of just conduct", not that there cannot be rules which *augment* these rules (unless, of course, they conflict with these rules, in which case the "rules of just conduct" should typically have an overriding force).

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<sup>13</sup> As argued in *The Constitution of Liberty* (Hayek 1960, 210) and *Law, Legislation and Liberty* (1979, 128-152).

<sup>14</sup> A very similar argument to the one advocated by David Hume (1962, 303-311; 1978, 496-498), and restated by Hayek on numerous occasions (1973, 55-71; 1976, 15-17).

If the reader is to properly understand this argument, it is of the utmost importance that one does not fall into the error of assuming that there is a strict equation between the set of minimal rules governing social interaction and those which exist in actual *institutional* practice. In particular, one must guard against assuming that “rules of just conduct” are *equate*d with existing rules of *law*, and in particular, private law. It sometimes seems as if Hayek falls into this trap, in that he first distinguishes between abstract rules of conduct (which he terms “rules of just conduct”) and more concrete rules embedding concrete goals (termed “rules of organization”), and then goes one step further and seems to effectively *equate* the existing rules of private law with rules of just conduct.<sup>15</sup> Such a move would be objectionable because of its implicit assumption that the *present* rules of private law *already* embed all of the minimal obligations which sustain the necessary conditions for action and social life. If one were to argue that this is Hayek’s position, then it would be a poor one. I would argue that Hayek does not in fact do this, and that for him “rules of just conduct” and rules of private law, though overlapping, are not identical.<sup>16</sup> But regardless of Hayek’s position, the point to be emphasized is that one must be on guard against the uncritical identification of *existing* rules of private law and the general system of abstract rules of conduct necessary to sustain an abstract society. From the point of view of this chapter, the two are not, nor do they necessarily need to be, identical.

## 6. Introducing the minimum coercion filter

The discussion above contends that for conduct to be capable of sustaining an abstract form of society, it must be governed by shared, and predominantly negative, rules which are abstracted from the commonalities shared by the more particular codes of conduct guiding the conduct of the different individuals (and groups of individuals) in society. This section seeks to address the question whether the filters over admissible rules of conduct introduced thus far in the thesis are sufficient to ensure that abstract societal relations are sustained.

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<sup>15</sup> He also seems to equate rules of public law with rules governing organizational order. That is, Hayek takes “the distinction between private and public law as being equivalent to the distinction between rules of just conduct and rules of organization (and in doing so, in conformity with predominant Anglo-Saxon but contrary to continental-European practice, place criminal law under private rather than public law)” (Hayek 1973, 132).

<sup>16</sup> That Hayek does distinguish between the two types of rules is implicit in much of his discussion in *Law, Legislation and Liberty* (1973; 1976; 1979) and in perhaps most obvious in his discussion of the need for legal reform outlined in the earlier chapter on cultural evolution. For this argument to make sense, Hayek *must* be presupposing that one *can* differentiate between existing institutional rules of law and “rules of just conduct”.



The argument which extends over the many sections that follow is that these filters are not in themselves sufficient to preserve these types of relations. What is required, then, is one further condition — the implementation of justice through the application of the *minimum coercion filter*.

Why, then, do we resort to yet another filter? Why are the previous filters insufficient to ensure that abstract social relations are supported? And, finally, what is the relationship between this filter and justice? I will examine this third question in the section which follows. For the moment, then, consider the first two queries: why introduce another filter, and why are the filters we have already examined not up to the task of supporting an abstract society? There are two aspects to consider in answering these questions. First, in one sense the minimum coercion filter is merely the articulation of a foundational basis of this work which has been ever present but rarely explicit — the notion of rank-order importance.<sup>17</sup> All of the previous filters simply assumed that there was a background rank-order which invoked closures and which was used to compare and weigh one possibility against another. It is now time to explicitly examine the implications of the notion of rank-order and its application to the concept of coercion.<sup>18</sup> Second, the reason for introducing this filter is that it is of fundamental importance. The reason for this is that although a rule may be abstract, negative and commonly shared, this is not sufficient to ensure that the *ranking* of individuals' priorities is respected. In other words, without a notion of rank-order, it might be the case that actions of lesser importance override actions of greater importance. The minimum coercion filter addresses precisely this issue, for it governs conflicts in such a way that the only justifiable reason for coercing one individual or group is the prevention of still greater coercion to another.

## 7. Justice in an abstract society

What, then, is the relationship between justice and the minimum coercion filter? The answer to this question requires a development and discussion of the concept of justice and

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<sup>17</sup> Alternatively referred to as an intensity, weight, or strength ordering.

<sup>18</sup> As mentioned in a previous chapter, the minimum coercion filter could perhaps be incorporated into a combination of UCC filters and the test for the consequences of a particular act. The reasons for resorting to a coercion filter is its more direct connection with the conceptual framework of this chapter and in particular its connection with justice and coercion. In addition, such a filter is more explicit in its consideration of the concept of rank-order and the conflict between rules of conduct.



coercion which underlies this thesis. For the moment, however, I will turn to the more limited consideration of justice in an *abstract* society and the relationship between justice, law, and the role played by abstract rules of conduct. The relationship between abstract rules and law becomes clearer when one realizes that rules engender *expectations*. Order flows from individuals following rules which engender expectations. One of the law's roles is to resolve conflicts between these expectations (and hence, between rules) and actuality such that a maximum of what might be called "expectational regularity" is achieved. As Hayek puts it,

...the central problem [of law] is which expectations must be assured in order to maximize the possibility of expectations in general being fulfilled. This implies a distinction between such 'legitimate' expectations which the law must protect and others which it must allow to be disappointed. And the *only* method yet discovered of defining a range of expectations which will be thus protected, and thereby reducing the mutual interference of people's actions with each other's intentions, is to demarcate for every individual a range of permitted actions by designating (or rather by making recognizable by the application of rules to the concrete facts) ranges of objects over which only particular individuals are allowed to dispose and from the control of which all others are excluded. The range of actions in which each will be secured against the interference of others can be determined by rules equally applicable to all only if these rules make it possible to ascertain which particular objects each may command for [their] purposes. In other words, rules are required which make it possible at each moment to ascertain the boundary of the protected domain of each and thus to distinguish between the *meum* and the *tuum*. (Hayek 1973, 107, my italics)

As was argued in the previous chapter, the task of guiding expectations in an abstract society falls upon abstract rules. The argument made in earlier chapters was that rule-based mechanisms are the only ones which can delineate the individual's sphere *and at the same time* allow individuals to govern their own conduct in a way which can sustain a complex society and allow for the possibility of objective conflict resolution. Of course, there could exist societies in which some commanded and some obeyed, in which case there would not be a rule-defined sphere for *some* individuals. The question is, however, whether such a structure of governance would be capable of allowing individuals to act autonomously in adjusting their behaviour to complexity in a way which is essential to a complex society, or whether it could allow for the potentially objective resolutions of conflict. This chapter, and those which preceded it, have argued that it could not, and that such a change in governance structure would be incompatible with the existence of abstract social relations and social complexity.

Where, then, does justice come into the picture? Justice is based on the idea that conflict *should be* reduced to a minimum. Within the framework set out in this thesis, justice is the principle that conflicts between actions should be resolved by referring to the minimal shared obligations underlying action and social life. These obligations are supported by shared abstract rules of conduct and the mechanisms which support them; hence, justice is the striving to reduce conflict between these rules (or, more accurately, between the conduct that these rules govern) using these mechanisms.<sup>19</sup> To put it differently, justice implies that conflicts should be resolved by resorting to *just* rules of conduct and the mechanisms which support them. But how, then, is one to decide which rules are just and which rules are not? In conflicts between rules of conduct,<sup>20</sup> just rules of conduct are those which are the *highest-ranking* of the competing rules. These highest-ranking rules support the minimal obligations upon which action and social life depend. Thus, in an abstract society conduct is just if it is governed by abstract, predominantly negative, rules of conduct which support the minimal obligations of action and social life, and if it implements the rank-ordering over forms of conduct which these obligations engender. Just conduct, then, is conduct governed by abstract rules using a *shared* rank-order, i.e. one ranks conflicts between one's acts using *this* ordering.

It might, for the moment, be helpful to consider the more specific question of what is a just judgment. Under the theoretical framework put forward in this thesis, a just judgment would be one which does what is "right", regardless of the cost in the concrete case in which the judgment was made. In other words, just judgments are those which can be independent of the circumstances one might think desirable. Just judgments are those judgments which are "correct" independent of one's desires, and are considered "right", but are not necessarily in accord with what we desire at the particular moment. Just judgments, then, abstract from the particular desires of the moment and are based on rules which support longer-term values. From all of this it can be argued that justice is concerned with judgment

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<sup>19</sup> The Hayekian notion of justice has been controversial, in that it focuses primarily on conduct and only secondarily on states of affairs. This contrasts markedly with studies of justice, such as David Miller's (1976, 17-51), which focus on states of affairs and distributional issues. The rationale underlying Hayek's focus will be touched on in the section that follows, and discussed at greater length in chapter eight.

<sup>20</sup> Does justice, then, apply to *all* situations of conflict? No. It applies only to those situations which are governed by the abstract rules of conduct which support the minimal obligations of action and social life. It does not apply to an individual's actions insofar as it remains within the individual's sphere established by these rules and does not violate some other individual's sphere. Justice, therefore, includes a sphere within which the choices of an individual have priority, and it is the very abstract rules of conduct presupposed by justice which establish such a sphere.

governed by abstract rules, based on (abstract) values, and not the particular goals of the moment which depend upon these values. Justice, then, is concerned with maintaining and protecting the minimal values upon which action and social life depend. Furthermore, it is the existence of these minimal obligations and values which underlie, and support, the rank-ordering over actions which allows attributions of justice to take place in the first place.

What, then, is the relationship between the principle of the Rule of Law and justice? Justice in a sense presupposes the principle of the Rule of Law. Justice is concerned with minimizing conflict and focuses on the rank-order of rules of conduct (which are *presupposed* to govern conduct). The Rule of Law, on the other hand, has two prongs. The first is its minimal aspect, in which it sets down the minimal conditions for conduct regularity which are required by social life. The second prong is its aspirational one, in which it states not only that individuals must subject their conduct to the governance of rules (if social life is to be sustained), but also that this form of governance should be *perfected*. Justice, then, presupposes the “principle of treating all under the same rules” (Hayek 1976, 39) and strives towards the minimization of conflicts between actions governed by abstract rules of human conduct,<sup>21</sup> and hence between the expectations such rules engender. On this view, then, justice is striving towards the minimization of conflicts between expectation and actuality as governed by shared,<sup>22</sup> predominantly negative, abstract, rules and the minimal obligations for action and social life which these support.

This discussion reveals a point which must be emphasized. The argument thus far has presupposed that justice must be objective. Furthermore, in an abstract society justice must be based on abstract rules, for they are the sole basis on which objectivity can *potentially* be sustained. “Objective” rules are rules that are shared in common, implying individual- and context-specific detail is stripped off in the process of abstraction which generates such rules. All of these aspects are held in common by justice and the principle of the Rule of Law. It is perhaps important to emphasize, however, that justice and the principle of the Rule of Law are not identical. One might be thinking that the principle of justice in an

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<sup>21</sup> In Hayek’s terms, the test of the “justice of [a] particular act [will be] the compatibility of the rule by which I judge it with all the other rules in which I also believe” (Hayek 1976, 43).

<sup>22</sup> In the sense of objective, implying the same are held by different individuals. This is of decisive importance, for to quote from Hayek this “whole conception of justice rests on the belief that different views about particulars are capable of being settled by the discovery of rules that, once they are stated, command general assent. If it were not for the fact that we often can discover that we do agree on general principles which are applicable, even though we at first disagree on the merits of the particular case, the very idea of justice would lose its meaning” (Hayek 1976, 15).

abstract society is remarkably similar to the principle of the Rule of Law. It would seem that both are based on the idea of resolving disputes through a filtering out of concrete detail by the process of abstraction. How, then, does justice differ from the principle of the Rule of Law?

The difference between them might be a subtle one, but there is a significant difference nevertheless. As mentioned above, justice strives to minimize conflict, and this explicitly refers to a rank-ordering over rules of conduct. The principle of the Rule of Law, on the other hand, strives to govern conduct by rules, and in this striving a rank-order of rules which is used to resolve conflicts is only implicit. As noted above, one could say that in an abstract society justice presupposes the Rule of Law (in that it presupposes the existence of abstract rules of conduct) and that the Rule of Law presupposes the principle of justice (in that if there are conflicts between rules, they must be resolved by resorting to a rank-order which minimizes conflict). The *focus*, then, of justice and the principle of the Rule of Law constitutes the primary difference between the two concepts. The principles of justice and the Rule of Law are similar and they are interrelated, but they are not the *same*.

The reader might be reminded of an important qualification to the discussion above. The *content* of the concept of justice discussed above can differ in its degree of abstractness depending upon the degree of concrete commonality present in the group or society under consideration. The notions of justice within such *Gemeinschaft*-type societies *can* be based on rules of a more concrete level of commonality, but as one focuses on larger and more inclusive groups the content of the rules of justice governing these groups is filtered out by the requirements of commonality demanded by abstract social relations.<sup>23</sup> In other words, as the notion of society expands, and begins to encompass a wider range of somewhat heterogeneous groups, only the commonality between the rules of conduct governing these groups can form the basis of shared — objective — rules of justice. Thus, an abstract society's rules of justice must necessarily be more abstract and exclude more concreteness than the subgroup's rules of justice from which they are distilled.<sup>24</sup> And how is this filtering of concretes accomplished? By the process of abstraction, which underlies all of the mechanisms governing and supporting social life and abstract society.

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<sup>23</sup> "The applicable rules define the features which are relevant for the decision as to whether an act was just or unjust. All features of the particular case must be disregarded which cannot be brought under a rule that once it is stated is accepted as defining just conduct" (Hayek 1976, 16).

<sup>24</sup> Indeed, "the *possibility* of justice [in a *Gesellschaft*-type society] rests on [the] necessary limitation of our factual knowledge" (Hayek 1973, 13, my italics).



## 8. Justice and “states of affairs”

There is one final aspect which must be considered before turning to a consideration of the relationship between justice, the Rule of Law, and the minimum coercion filter. This is the question of the range of applicability of the rules of justice. As stated above, the rules of justice are rules applicable to human conduct. What exactly does this imply? Does it, for example, rule out the application of the concept of justice to “states of affairs” (and hence exclude consideration of many of the issues associated with distributive justice)?

Once again, the short answer to this is that it does not, but once again this response must be qualified. The argument that justice applies only to human conduct implies that something which no one could make different cannot be governed by rules of justice. That is, this thesis uses the term justice to refer to conduct and to states of affairs that someone could make different. Now, a necessary condition for states of affairs — states of *being* — to be governed by rules of justice is that “we hold someone [or some group] responsible for bringing it about or allowing it to come about” (Hayek 1976, 31) *or* that we allow it to continue. Now, is this condition for the applicability of judgments of justice an unduly restrictive requirement? Some would claim that it is. They would argue that restricting issues of justice solely to situations where an individual or group can be held responsible is unnecessarily restrictive and will allow numerous injustices to persist.<sup>25</sup> This is an important point. In fact, it is of such importance that the entire chapter which follows is devoted to it. For the moment, however, the scope of this inquiry will be narrower. I am interested in focusing on some minimal necessary conditions for the application of rules of justice, and not for the more particular issue of whether responsibility-attributions to individuals or groups are also a necessary condition for questions of justice to arise. The necessary conditions for holding that a state of affairs is unjust which I want to consider, then, are that (a) it is governed by rules of justice and (b) that it ought not to be the case. This means that the state of affairs both *could* and *should* be different.<sup>26</sup> What this implies is that if we are making a claim that something ought not to be the case, we must necessarily be claiming

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<sup>25</sup> As is argued, for example, in Macleod (1983), whose paper is discussed in the chapter which follows, Sadurski (1985, 22-25), and Miller (1989, ch. 1 sec 2).

<sup>26</sup> “To speak of justice always implies that some person or persons ought, or ought not, to have performed some action; and this “ought” in turn presupposes the recognition of [not necessarily articulated] rules which define a set of circumstances wherein a certain kind of conduct is prohibited or required” (Hayek 1976, 33). “It presupposes not only that those whose duty it is thought to be [to perform an action] can actually do so, but that the means by which they can do so are also just or moral” (Hayek 1976, 32).



that (a) it is possible for that state of the world to be different, (b) that someone *in particular* (though we might not know who *in particular*) must have it in their power (though we might not know how *in particular*) to make that state of the world different and (c) that there is no conflicting “ought” rule which overrides the claim that something ought not to be the case. What is required by such a normative claim, then, is that (a) it is possible for things to be different and (b) that there does not exist an *overriding* normative rule supporting that state of the world.

All of this depends, of course, upon the temporal boundaries underlying a justice claim.<sup>27</sup> These boundaries can represent a point of difficulty. To what period of time is one referring? The particular moment? The next year? A lifetime? A difficulty arises because whether or not an action is “possible” depends upon the circumstances of the particular moment and situation, including the knowledge and information of the individuals in question. What may be impossible given the knowledge present in one set of circumstances might well be possible in another. This implies that some time horizon must be implicit in decision-making mechanisms. Assume, for the moment, that one were willing to presuppose the existence of a mechanism which conditioned on certain forms of knowledge and information available, at the moment of judgment, to those making the decision (and was governed by rules of exclusion by which the boundaries of knowledge and information were closed off). If this were the case, then to show that a state of affairs is governed by the rules of justice would require only the demonstration that somebody — though not any person in particular — “*could and should* [arrange] things differently” (Hayek 1976, 32, my italics).

What, then, are the implications of restricting arguments of justice in this way? Probably the main implication is that in an argument concerning justice it is not sufficient to point out that some undesirable state of affairs could be different. Instead, what is required is an argument that it both *could* and *should* be different. This is an important distinction, for at least two reasons. First, it underlies Hayek’s objections to distributive justice. Hayek’s argument, briefly put, is that it is not merely whether distributive justice is possible, but rather whether individuals *should* adopt the mechanisms required to put such a concept of justice into effect. This argument is one that I shall return to in the chapter which follows.

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<sup>27</sup> This issue is similar to the one underlying the restrictions on universalization which I alluded to in an earlier chapter. All such normative arguments depend on closures over the temporal horizon. Both the argument concerning universalization and this discussion are simply manifestations of this more general principle.

The second reason for the importance of this distinction is that it plays an important role in the definition of coercion, and it is to this concept that the thesis now turns.

## 9. Coercion

The notion of coercion is an essential element of a mechanism model of law. It is also crucial to Hayek's legal theory. For these reasons, it is of decisive importance to be clear as to what this notion means. There has been a great deal of discussion of, and some confusion over, Hayek's notion of coercion,<sup>28</sup> and it must be said that his statements on the issue have to some degree contributed to this. What this implies is the need for a clear and concise restatement of the essential core of the idea, and a critical assessment of Hayek's contribution. This, then, is the goal of this section.

What is coercion? The essential idea is that one is "forced" to perform some act which one does not want to perform or that one is "forced" to abandon some path of action one desires. A voluminous literature<sup>29</sup> examines what it means to be "forced". These analyses examine questions of whether one can be forced by circumstances, of whether coercion applies only to the actions of other human agents which force one to act in undesired directions, and of whether there is a substantive difference between being forced by circumstances or by another human agent. These are questions of obvious importance and the sections that follow will address them at some length. This thesis will for the most part, however, focus on Hayek's writings and not at this wider literature. The reason for this is that Hayek's texts provide, with some modifications, a workable definition of coercion which itself contributes to this literature. The goal, then, is to spell out Hayek's contribution and to make the necessary modifications to this conception such that it can fit into the theoretical framework of this chapter.

My strategy, then, is to examine Hayek's definition of coercion, which asserts that coercion is limited to forcing by other human agents (or groups of such agents), and then critically dissect his arguments with the hope of giving some insight into the foundations of these views. Some of Hayek's errors notwithstanding, it is then asked whether a modified notion of coercion might be capable of supporting Hayek's assertion. I argue that it is, and

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<sup>28</sup> The most interesting of these would include the discussions of Hamon (1961), Kukathas (1989), and Miller (1989).

<sup>29</sup> Which is examined in some detail in Wertheimer (1987).

that this version of the notion of coercion is capable of supporting the general theoretical perspective elaborated in this thesis. The chapter then turns to an examination of the implications of such a notion of coercion for the theory of justice and Rule of Law presented in this chapter.

So what, then, is coercion? The concept is based on the idea that in social settings conflicts between individuals are common. Some of these conflicts will constitute coercive conflicts, others will not. Coercion occurs when one is turned into a tool used for implementing the goals of another *and* one's own goals are overridden. One becomes a means to their ends, and their ends only, for their manner of conduct eliminates one's ability to achieve one's own goals. One is not able to follow one's own goals, but instead becomes a means for the implementation of the goals of another. Coercive conflicts, then, are those conflicts in which one agent imposes their concrete goals on another *in such a way* that this imposition constitutes coercion. What, then, constitutes the coercive way of acting?

Consider Hayek's view on the matter. In his view, coercion occurs "when one [person's] actions are made to serve another [person's] will, not for his own but for another's purpose" and that although a choice is made by the agent their "mind is made someone else's tool, because the alternatives before me have been so manipulated that the conduct that the coercer wants me to choose becomes for me the least painful one" (Hayek 1960, 133). In other words coercion "implies both the threat of inflicting harm and the intention thereby to bring about certain conduct" and the "alternatives are determined for [them] by the coercer so that [they] will choose what the coercer wants" (Hayek 1960, 134). Hayek also notes that the "threat of physical force is not the only way in which coercion can be exercised" (Hayek 1960, 135). Coercion, on Hayek's view, occurs when one agent's conduct is such that (a) my choice of conduct is narrowed by (b) the threat of harm to (c) such a degree that I will choose to perform (or *not* to perform) the actions *they* — and not I — intend.

There are a couple of point to note. First, Hayek does not consider coercion to be applicable to situations in which another forces me to such a degree that it becomes difficult to say that I have any choice at all. Hayek terms such forcing "violence" (Hayek 1960, 133). For example, "if my hand is guided by physical force to trace my signature", this is "violence" but does not, to Hayek, constitute coercion. On his view, coercion "implies...that I still choose" (Hayek 1960, 133).

Now, if it were always obvious that Hayek's objections to coercion extended with equal (and probably greater) force to "violence", and that his arguments implicitly refer to both

notions of forcing, there is little harm in making such a separation between the two concepts. But it is precisely because this is not the case that a re-evaluation of this usage must be considered. It sometimes seems as if Hayek simply ignores his own distinction and focuses his discussion solely on the minimization of coercion.<sup>30</sup> And given that this is the case, it is not surprising to find this focus on coercion, to the exclusion of any consideration of violence, is taken up in the discussions of his critics.<sup>31</sup> Important as one might believe the distinction between potential and actual harm to be, I would argue that Hayek's distinction between "violence" and coercion is unnecessary, for the simple reason that there is nothing in his theoretical system which demands such a restriction. Nor is there any need for such a distinction in the theory developed in this thesis. Coercive situations arise when the alternatives available to one are narrowed in an unacceptable manner by another with the intention being that the coercer implements their own ends. What is the importance of distinguishing this from a situation in which one's choice is narrowed by another *to such a degree* that one has *no* alternative action available and hence no choice? I would argue that there is no important difference.<sup>32</sup> If anything, what Hayek terms "violence" is the most *extreme* form of coercion.<sup>33</sup> It is precisely the fact that one's desired choice is overridden by another which lies at the core of the idea of coercion. Basing the notion of coercion on a "voluntarist" interpretation, and restricting it to situations where the coerced continues to choose adds little to this, for it is precisely the question of whether or not an individual *can* be said to "choose" at all which is at stake.

Within this thesis, those situations in which one narrows the alternatives available to another in an unacceptable way with the intention of implementing one's own goals will be deemed to be coercive. As this is the case, this thesis does not adopt Hayek's restriction of

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<sup>30</sup> As in his discussions in *The Constitution of Liberty* (1960, 11-21, 133-147).

<sup>31</sup> See, for example, Kukathas (1989, 142-165) and Miller (1989, ch. 1 sec. 2), with the latter quite accurately picking up on some of the inconsistencies which flow from a separation of "violence" from the concept of coercion.

<sup>32</sup> One difference seems to be that while violence *actually* limits one's alternatives, threats only *potentially* do. In this sense, then, violence represents the actuality of limitation over conduct, while threats act upon the alternatives *within* mind. Whether this difference is in fact an important one is, of course, another matter. I am of the view that little of consequence for this thesis hangs on the different causal pathways of these distinguishable forms of limitation.

<sup>33</sup> Perhaps it is the "self-evident" nature of this form of forcing which makes it unnecessary to include it under the definition of coercion. What is important, however, is that this "self-evidence" must not lull one into forgetting that "violence" is perhaps the most obnoxious form of forcing, and hence it must be the focus of special attention for those who wish to minimize coercion. Its particularly objectionable quality stems from the actuality of its force, i.e. one is not merely threatened (in which case it is at least *I* who act and *I* who control my behaviour) but one actually loses control over one's own body. It is of the utmost importance to prevent violence, then, because there is even less of a chance to hold onto some semblance of control over oneself.



coercion to situations where a coercee can consciously choose between alternatives, for one can be the means for someone else's ends whether one can make a conscious choice or not.<sup>34</sup> Instead of restricting coercion solely to those situations in which coercees can choose to act differently, this way of viewing coercion also extends it to situations in which one cannot choose one's actions, the decisive point being *why* one is unable to choose, and not whether one can, or cannot, choose. In the terms of this thesis, conduct is coerced if another's *unacceptable* conduct so limits my alternatives that I become a means for their, and not my own, ends.<sup>35</sup> On this view, then, another agent's *conduct* could coerce me — *threatened* harm is *not* required — and it might be the case that this conduct puts me in a situation where I have no choice at all but to fulfil (or to not negate) their ends.

This leads to a second point: what does it mean to say you have affected me to the extent that I have "no choice" but to act as a means towards your ends? Does it mean that I have no control over myself, that you are exerting such control that my desires disappear completely? No, it does not. Though physical violence to another is one method of making me (or at least my body)<sup>36</sup> do your bidding, it is not the only way. There can be a variety of *threats* which one can use ("threats" being the differentiated from "offers" in that the former rely upon the deliverance of *harm*,<sup>37</sup> while the latter do not). "Your money or your life"

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<sup>34</sup> Such a modification does not constitute a decisive objection to Hayek's theory, for he does argue that "violence" (i.e. situations in which one has *no* choice and is forced to be the means for another's ends) is "as bad as coercion proper and must be prevented for the same reason" (Hayek 1960, 133). The important point, I think, is that Hayek believes that both "violence" and "coercion" are objectionable, and hence should be prevented.

<sup>35</sup> The notion of coercion to which I resort is similar to the one elaborated by Alan Wertheimer's *Coercion*: "A coerces B to do X if and only if (1) A's proposal creates a choice situation for B such that B has no reasonable alternative but to do X and (2) it is *wrong* for A to make such a proposal to B" (Wertheimer 1987, 172). The notion of coercion which shall form the basis of the discussion which follows modifies this definition slightly, and runs as follows: A coerces B to do (or not to do) X if and only if (1) A's actions create a choice situation for B such that B has no reasonable alternative but to do (or not to do) X and (2) it is wrong for A to perform such actions to B. This notion differs from Wertheimer's in two directions. First, it makes explicit the fact that coercion can refer both to situations in which one is forced to perform an act and to those in which one is forced to abstain from certain conduct. Second, it broadens the definition of coercion to include both proposals and other forms of action. That is, not only proposals can coerce — other forms of conduct can coerce as well.

<sup>36</sup> Note that it becomes difficult to talk of the "self" taking responsibility for the actions of one's own body when one's body becomes the tool of another. Am "I" coerced when my body is used by somebody else as a tool? In this sense, then, the act of physical violence seems to negate the connection between the "self" and the body, and hence makes it difficult to speak of a "self" being coerced. Perhaps this underlies Hayek's point that one is not being coerced when the "self" ceases to act and the body becomes a tool of another. If this is his point, it is well taken. In this thesis, however, the important issue is *how* one's body becomes disconnected from the "self", and there is little point in excluding from consideration *all* cases where this in fact happens without first considering how it was that this came about. It is precisely because some of the ways in which one's "self" becomes disconnected from one's body are the results of the unacceptable methods of another which makes this an important issue for notions of coercion.

<sup>37</sup> The notion of harm rests, of course, on perspective. The importance of perspective, and in particular the limitations this imposes on conduct governance in a *Gesellschaft*-type society, will be discussed at some length in the sections which follow.

presents one with a choice (unless they simply take the money, in which case you are being called upon to *not* act), but one could probably claim that such a choice was coercive. Why is this? I would argue that it is because the narrowing of your choice occurred through *unacceptable* means.

Which brings me to a third point: what are “unacceptable means”? This depends upon the society to which one is referring. If one is referring to coercion in an abstract society, “unacceptable means” are those which violate the abstract negative rules of conduct governing that society. Thus, in an abstract society I am coerced if you override my choice of conduct and turn me into a means for achieving your ends by violating one of the negative rules of conduct which govern social conduct in this type of society. Thus, both the way in which you go about trying to get me to achieve your ends and the type of social relations which are presupposed to underlie coercion claims (including the mechanisms which support them) are of decisive importance in deciding whether or not one *has* been coerced. In an abstract society, if you narrow my alternatives, with the intention of having me implement your goals, by conduct which does not violate these rules, you do *not* coerce me. Even if you act in a way which from *my* perspective makes me worse off, you do not coerce me *unless* you violate a *shared* negative rule which sets out those acts which you should not perform. Thus, if Hayek’s argument that “the action of the coercer [must] put the coerced in a position which [*they*] regards as worse than that in which [*they*] would have been without that action” (Hayek 1967, 349, my italics) refers to conduct within the governance structure of an abstract society, it is incorrect. It is not the individual’s perspective that is important — whether they feel worse off is not the decisive issue — but rather whether or not the conduct of the “coercer” has violated one of the predominantly negative rules governing conduct in this type of society.<sup>38</sup>

This insight into the nature of coercion in an abstract society can be used to explain why Hayek argues that circumstances (as opposed to human conduct) cannot coerce.<sup>39</sup> In a social system, “circumstances” are not merely “givens” but are instead often intimately connected with the conduct of individuals. To claim that some circumstances should be different *necessarily* implies an obligation upon others to make it so. But upon what is this “should”

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<sup>38</sup> Hayek seems to recognize this point in his later discussion, for he points out that in situations where “a moral or legal obligation” exists (Hayek 1967, 350), it is coercive to not conform to these. What he does not seem to realize is that *all* situations of coercion share this same requirement.

<sup>39</sup> To Hayek, coercion “refers solely to a relation of men to other men” and that “the range of physical possibilities from which a person can choose at any given moment has no direct relevance” (Hayek 1960, 12).

based? Upon normative arguments, presumably. Do these, then, take into account the ongoing order of society and the pre-existing abstract rules which govern conduct in this society? Are these normative arguments based upon these? If so, and one turns to a consideration of increasingly complex environments, do they mesh with the *negative* nature of these rules, which entail that individuals do not perform certain actions but which do not prescribe particular conduct? This is a crucial point, for it is the type of obligation which such normative arguments entail that is of decisive importance. For example, are the obligations abstract? That is, do the obligations extend to all individuals at all times? Or do they merely extend to subgroups of society over a particular time? And are the obligations negative?

This last question is, of course, a conditional one, for the degree of commonality of the society in question is intimately related to the form of the rules which can pass through the filters supporting an abstract society. If one is considering a *Gesellschaft*-type society, which is relatively complex and contains various diverse *Gemeinschaft*-type societies, then positive rules will tend to be filtered out to a higher degree than would be the case in abstract societies containing more commonality. If, then, the argument is that there is an obligation upon individuals to *perform* certain acts and make circumstances different from what they are, then it would seem that this is based more upon a vision of *Gemeinschaft* levels of commonality, than upon the more abstract requirements of an abstract, *Gesellschaft*-type society. If, on the other hand, the argument is that there are abstract obligations applying to everyone which impose an obligation to *refrain* from certain acts and make circumstances different, this is in principle compatible with the form of rules which govern a *Gesellschaft*-type society. It would seem, then, that whether or not “circumstances” can coerce depends upon the underlying type of social relations which act as an implicit and essential presupposition for any coercion claim. Thus, the line which is drawn between human and non-human interference depends intimately upon the question of *who* could make “circumstances” different under *what* governance mechanism, in what type of social environment.

#### 10. The convergence of expectations under legal mechanisms

There is one further point which must be attended to before turning to a consideration of the relationship of coercion, justice, and legal mechanisms. It should be kept in mind that a

Hayekian notion of coercion is striving to be an *objective* one, i.e. based on commonly shared criteria, these being the negative abstract rules of conduct which govern an abstract society. Hence, it is *not* based on the perspective of the individual who is actually in the situation, but rather upon the perspective of an observer (or, one might say, upon the perspective of a hypothetical “impartial spectator” to this situation). There are at least three different aspects which might enter into such a perspective.<sup>40</sup> One is statistical: “what is usually considered to be coercive?”. The second is normative: “what ought to be considered coercive?”. The third is subjective: “what does the individual in the situation think is coercive, or ought to be coercive?”. An important point from the perspective of this study is that *if* the mechanisms which generate and filter rules are adopted — are part of the “normative fabric” of a society — there is the possibility that these three aspects might converge. That is, if there is a striving to achieve an impartial spectator perspective and the various filters over particularities in reasoning are continually applied, there is the possibility that the “is” and the “ought” might converge in their *abstract* aspects. If this occurs, then it could be said that what *is* normally the case is what *ought* to be the case, and that individual X’s perspective — which would also be striving to achieve such an impartial, abstract perspective — will be in accord with this. This convergence of expectations and actuality is of course intimately linked with the Hayekian notion of a well-adapted social system discussed in the second chapter.

Now, to be accurate, two qualifications should be mentioned. First, under the mechanisms of the previous chapters, this convergence would only be in abstract aspects, not in its concretes. The implication of this which must be stressed relates to the *type* of normativity which facilitates this convergence. There are two “oughts” at play here. First there is the “ought” that the mechanisms which sustain an abstract society ought to be adopted. Second is the “ought” that the commonly shared, minimal and predominantly negative obligations which sustain this society ought to govern conduct. Note that neither form of normativity leads to the implication that obligations which are less widely-shared, or those which cannot pass through the filters sustaining an abstract society, will lead to such a convergence in environments of increasing complexity. A second and related point is that this convergence is not, strictly speaking, between the “is” and the “ought”, but rather

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<sup>40</sup> This approach is based on Wertheimer’s use of “statistical”, “moral” and “phenomenological” baselines (1987, 207).



between the “is not” and the “ought not”. Most of the mechanisms of this work filter out — negate — possibilities and do not specify what will be the case but rather only support what will not be the case. All of this helps one to understand the Hayekian emphasis on the negativity of justice. Hayek’s concept of justice is defined negatively as the minimization of injustice: “we have no positive criteria of justice”, only “negative criteria which shows us what is unjust” (Hayek 1976, 42). In other words, “the pursuit of the ideal of justice...does not presuppose that it is known what justice...is, but only that we know what we regard as unjust” (Hayek 1976, 54).<sup>41</sup> The purpose, then, of the many filtering mechanisms of this thesis is to facilitate such a convergence between expectations and actuality,<sup>42</sup> or, put differently, between the “could” and the “is”, through the mechanisms adopted to filter out “ought not” conduct. One of the main goals, then, of Hayek’s legal theorizing, and also of this study, is to provide justifications for why, if one desires to preserve abstract social relations, one should incorporate such mechanisms into social decision-making and judgments.<sup>43</sup>

## 11. Coercion, justice and legal mechanisms

How, then, is the notion of coercion discussed above related to the concept of justice? And what is its relationship to law in its role as a conflict-resolution mechanism? Simply put, the striving for justice is the striving to minimize conflicts, and in an abstract society this is transformed into the striving towards the minimization of conflicts between abstract rules of human conduct and hence between the expectations such rules engender. These conflicts, then, are *coercive* conflicts, and the law’s role as a facilitator of the regularity of conduct and as a conflict-resolution mechanism is to strive for justice by minimizing coercive conflicts.

Note that the question is which actions will be filtered out as coercive *by legal mechanisms*, and *not* which actions *are* coercive. Coercive conduct is defined as such by *pre-existing* rank-ordered obligations which individuals manifest in their everyday conduct.

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<sup>41</sup> This is identical to Fuller’s view on the difference between knowing what is right and knowing what is wrong (Fuller 1969, 10-12).

<sup>42</sup> The germ of this idea was first put forward in a different context in 1937 in Hayek’s remarkable paper, “Economics and Knowledge” (Hayek 1948, 33-56). This insight came to dominate Hayek’s writings for the next fifty years. Indeed, it is quite accurate to view his various studies in economics, political and legal philosophy, and psychology as trying to explain the processes underlying the matching of expectations to actuality.

<sup>43</sup> And, if one desires to act within the framework of an abstract society, into one’s personal conduct as well.

It is not, therefore, legal mechanisms which define which conduct is coercive and which is not, but rather it is these pre-existing obligations and values which are decisive. Legal mechanisms put into effect these pre-existing obligations — they do not create them. The notion of justice, then, underlies the notion of coercion, and it is individuals' pre-existing classifications, as manifested in values and obligations, which determines whether an action is coercive or not. Whether these same values and obligations are embedded in the actual manifestations of legal mechanisms is, then, a different matter. The principle of justice implies that they should be, but whether they actually are is another matter. If this were not the case, and coercion were defined solely by legal mechanisms, it would be difficult to discuss which actions legal mechanisms should *deem* coercive. Coercion classifications, then, are constituted external to legal mechanisms and are based on pre-existing obligations and values which are manifested in the shared, predominantly negative, abstract rules of conduct that individuals follow.

Even on this view of coercion, it might be questioned whether *all* the conflicts which come before legal mechanisms are indeed coercive. How, one might ask, are breaches of contract coercive? Or how are many of the delictual (tortious) actions which are brought based on coercive conflicts? Are even criminal cases based on the idea that one party has coerced another? The reader would be well advised to glance back at the idea which underlies the definition of coercion used in this thesis. Coercive acts are those in which X uses unacceptable means to turn Y into a means of achieving certain ends. This definition should allow one to see clearly what is at stake. In many criminal and delictual cases what is of decisive importance is not the *threat* of harm but rather the *infliction* of harm as a consequence of pursuing the coercer's own aims which, in the process, turns a coercee into a means for the achievement of the coercer's own ends by overriding the coercee's goals and values. In situations of violations of contract, what is occurring is that X is turning Y into a means by which X achieves X's ends, and is doing so in an unacceptable manner (by violating an obligation recognized as binding).

It might seem, however, that the discussion is contradictory in that it disregards its own notion of coercion. I have claimed that coercion occurs when X acts in an unacceptable manner to force Y to implement X's ends. Does this not imply that for Y to do this, Y must first *know* X's ends? And, if this is the case, is the discussion not a patently unrealistic description of the actual types of conflict which are resolved by legal mechanisms? The answer to this would be in the negative. This objection rests on a mistake, for there is *no*

requirement that a coerced individual *actually consciously knows* the ends which the coercer is striving to achieve. Nor is it a requirement that the coercer forces the *performance* of a particular act of the coercer's choice upon another. What is decisive is that the actions of the coercer narrow the alternatives of the coercee with the goal being to implement the goals of the coercer. This means that coercion can take place by either being forced to act *or* by having one's goals *negated*. In other words, coercion can occur where I am forced to *not* act in a manner of my choosing. Nothing in the notion of coercion used in this thesis requires that the coercee consciously know the ends of the coercer, nor is there any requirement that conduct be prescribed rather than negated. Rather, this notion merely requires that one becomes a means to someone else's ends by way of unacceptable methods. Thus, the objections that in most legal conflicts the coercee is not aware of the ends of the coercer and that typically the coercee is not forced to act in a prescribed manner are irrelevant to the issue of whether or not one is being coerced under the definition of coercion adopted in this thesis. The fact that the coercee's alternatives have been narrowed in an unacceptable manner coupled with the fact that they are forced to do (or not to do) something they would rather not do (or would rather do) because a path of action (or inaction) has been excluded in an unacceptable manner are, in the framework of this thesis, sufficient to constitute coercion.

So what, then, is the nature of coercive conflicts which are resolved by legal mechanisms? The underlying structure of coercive conflicts is, I think, remarkably similar, although there is a greatly differing emphasis on different aspects for each type of coercive conflict. For the purposes of this discussion I shall refer to some existing legal categories of private law, focusing on contract, delict (tort), and criminal law. There are a variety of questions, then, which must be answered for a conflict to be recognized as coercive within a legal mechanism. First, is there a pre-existing obligation between individuals or groups? Much of the examination of conflicts in contract focuses on precisely this question. As this is an area in which it is the conduct of individuals which in large part determines whether or not such an obligation exists, this is perhaps understandable. This question, however, also plays an important role in both delictual (tortious) and criminal cases. Second comes the question of the violation of this obligation, i.e. was there a breach of the pre-existing obligation? Intertwined with these first two questions is the issue of the level of the standard of conduct which is expected for the obligation in question. This standard is an objective (observer's) standard, which might, but does not necessarily, take into account subjective

aspects only when these are, or could be, known by an external observer.<sup>44</sup> Third comes the issue of harm. In some cases, harm to a particular party to the conflict must be demonstrated. In others, it is not necessary to demonstrate harm in the concrete case. In general, the greater the importance of maintaining a heightened degree of conformity with the general rule governing the obligation, the less important will be the *particular* consequences in the case at hand. In other words, if it is conformity in general to the rule which is of heightened importance, the particular consequences in any particular case will play a less important role in determining the harm done by violations of that rule. This is of particular importance when considering *attempts* (in contrast with conduct which was actually carried out). The fourth question is concerned with limitations on the range of obligations, using a variety of notions of intentionality, remoteness and causal connectivity, and a variety of rules governing circumstances in which obligations will be mitigated or perhaps even nullified. These can include actions on the part of the harmed party to the conflict if they contributed to a degree to the violation of the obligation in question.

At this point one might well be asking whether the structure just outlined is merely the abstract framework which governs questions of negligence in delict (tort). In general terms, this would in fact be correct.<sup>45</sup> The reason for calling on such a framework is that it is familiar to those readers acquainted with law, and that it exemplifies the issues which must be considered (however implicitly or explicitly) in all conflicts which come before legal mechanisms. This does not imply that this thesis adopts all of the *particular* rules and classifications used in issues of negligence, nor does it imply that each area of legal conflict has not developed its own particular rules and classifications which differ from those of delict. Rather, the goal is to point out the *abstract* similarity which governs each area of legal conflict, and for this purpose the structure which governs issues of negligence provides a useful, if provisional, framework. Therefore, the fact that there are concrete differences between the rules and classifications used in each area of legal conflict does not diminish the value of placing all legal conflict within a unified abstract framework, consisting as it does of obligations, breach of obligations, harm and limitations on obligations. This, then, forms the abstract, conceptual framework of legal mechanisms, within which the Rule of

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<sup>44</sup> i.e. as generated from an impartial spectator's perspective.

<sup>45</sup> For more on this, see Fleming (1977, 102-313).



Law functions, and through which the striving to achieve justice by minimizing coercion in an abstract society takes place.

## 12. Legal mechanisms and the minimum coercion filter

We come, then, to the final stage in the filtering process over the forms of action which are capable of governing conduct in a manner conducive to abstract social relations. This is the *minimum coercion filter*. As was stated previously, the reason for resorting to this final filter is that although the other filters of legal mechanisms (such as the striving for an impartial spectator perspective, the requirements of UCC, and the requirement of abstraction and negativity) attempt to ensure that rules are abstract, negative and commonly shared, this does not guarantee that the *ranking* of individuals' priorities is respected. Without a notion of the priority of rules, it could be the case that conduct of lesser importance overrides conduct of greater importance. The function of the minimum coercion filter, then, is to ensure against this.<sup>46</sup> Thus, coercive conflicts which come before legal mechanisms embed conflicts in prioritization. Coercion, in effect, overrides one individual's prioritization, for their desired rule of conduct is negated by someone else's priorities in an unacceptable manner. Coercion, therefore, imposes in an unacceptable manner the rank-order over conduct of one individual onto another. The minimum coercion filter, in combination with the other filters on reasoning (and in particular, the UCC filter, which performs a very similar task in a rather less explicit manner), attempts to resolve this "conflict with some other rule or value which we are not prepared to sacrifice" (Hayek 1976, 28); and it "may either lead to a clear 'yes' or 'no' answer or show that, if the system of rules is to give definite guidance, some of the rules will have to be modified, or so arranged into a hierarchy of greater or lesser importance (or superiority or inferiority), that in the case of conflict we know which is to prevail and which is to give" (Hayek 1976, 29). The question, then, is which forms of conduct will be deemed coercive by legal mechanisms and which will not. In other words, the question is which rule of conduct is to be given rank-order priority over the other.

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<sup>46</sup> As previously mentioned, the discussion of the consequences of acts is similar to the considerations falling under this coercion filter. The reasons for resorting to this filter are its close connection with the framework here established, and its more explicit consideration of rank-order and the concept of conflict between rules.

What, then, is the minimum coercion filter and how does it function? There are a couple of aspects to emphasize. The first point is that this filter does not function in isolation. Rather, it works in concert with the other filters introduced in earlier chapters. Conflict-resolution under legal mechanisms is not *solely* a matter of conflict between competing values. Instead, such conflicts take place within a sphere governed by legal mechanisms which impose restrictions over both the type and the form of values which enter into conflict-resolution. These filters impose restrictions on conduct governance such that, in a conflict between rules, generally applicable, i.e. abstract, rules should prevail over more concrete rules,<sup>47</sup> for the more abstract the rule, the more expectations it will engender in a wider range of environments. Under this criterion, to claim that a rule of conduct cannot be justified is to point out the lack of abstractness of the rule in question. This is what the filters over legal reasoning and justification search out — how *widely* the principle applies, and how *symmetric* it is. In some cases the labels of coercer and coercee seem to be *reversible*, i.e. the coercer could claim that it is in fact *they* who are being coerced. This reversal property flows from the basic symmetry of some of the rules of conduct which govern an abstract society (and in particular those which engender positive obligations). Obligations, then, are in some contexts symmetric. The question of importance is the *degree* of symmetry of obligations. The fact that there exists no (or weak) UCC justifications for a rule of conduct means, essentially, that the rule of conduct in question is not wide “enough” in its applicability to overrule its competitor.

The important point, from the perspective of the application of the minimum coercion filter, is the implicit notion of *weight* which underlies these comparisons. As the more detailed discussion of these filters in earlier chapters emphasized, the range and scope of a rule of conduct is itself delimited by its level (or degree) of abstraction. *Ceteris paribus*, more general rules should dominate more concrete rules.<sup>48</sup> The same holds for negative rules versus positive rules. The minimum coercion filter, then, makes explicit and tests the

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<sup>47</sup> As Hayek puts it, “justice, i.e. the generally applicable rule, must prevail over the particular (though perhaps also generally felt) desire” (Hayek 1976, 41).

<sup>48</sup> There are, of course, considerations which push in the opposite direction. These are limits to the degree of abstraction of rules which are *capable* of providing guidance in a form amenable to an abstract society. These rules, then, must allow for the decentralized judgments which form the foundation of such a society, and hence a rule cannot be “too” general, or it either be of little use in guiding particular forms of conduct or will require references to authority which can, if taken too far, undermine the ability of individuals to conduct themselves in a decentralized manner. There is, it seems, always a balance to be struck between rival considerations — an insight of which Fuller was keenly aware (1969, 44-46).

*weights* of the competing rules and their coercive effects. How, then, are these weights to be determined? And which principles carry the most force?

### 13. The fundamental importance of prohibitions on physical violence

With one exception, it will not be the goal of this work to examine particular rules of conduct or the particular values which underlie them. Though the final chapter discusses in general terms the weights associated with rules of conduct — and in particular, the interaction between the mechanisms under which these weights are generated and supported — it is not the goal of this work to argue for a particular set of values but rather to put forward the argument that the *way* goals are pursued is in many cases of equal importance to the particular goals which are pursued. Such a view, however, has been criticized on a number of occasions. In particular, Hayek has been accused, with some justification, of being loathe to advocate any particular principles as having any special weight within his theoretical framework for law.<sup>49</sup> This stems in part, I think, from his desire to avoid imposing his own goals and idiosyncratic values onto pre-existing social orders. It also coheres with his belief that context and particular facts (as determined by pre-existing abstract rules) are of fundamental importance in determining the results of legal judgments. It is, however, a dangerous strategy, for his entire framework presupposes the existence of certain principles and values which *are* shared in common. To not state *any* of these principles is to leave the door open to the claim that there are, in fact, no such shared principles at all. This is a claim this thesis emphatically rejects. Hayek's strategy, while perhaps suited to his predilections, is not one that will be followed in this thesis. What follows, then, is a brief discussion of one of the values — and, as it is negative, some of the forms of harm with which it is associated — which the author believes would have to play a part in any theory of law governing an abstract society. There are a couple of points to note before turning to the discussion. First, in discussions of systems of rules there will be, in many cases, an implicit or explicit *balancing* taking place between competing rules in different situations. It is not my goal to spell out all of the different trade-offs and conflicts which could exist between all of the different rules of a particular rule-system. Rather, my goal is the more limited one of discussing what is perhaps the dominant principle underlying

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<sup>49</sup> Although he does continually stress the need to prevent "violence" and to minimize coercion in *The Constitution of Liberty* (1960, 133, 135).

a *Gesellschaft*-type society. No rule has absolute priority for governance — if only because it comes to compete with itself (for example, a prohibition on intentional killing is in some situations balanced against an individual's rights to protect themselves, even if this means intentionally killing another). The point to emphasize is that rules are limited in their scope by other rules of responsibility-attribution. The second point to note is that the discussion that follows implicitly presupposes the existence of a framework of legal mechanisms similar to the one outlined in section eleven, i.e. based upon a system of rules supporting obligations, breach of obligations, harm and limitations on obligations.

The goal, then, is briefly to set out some of what is probably the most important obligation (and its associated forms of harm) which is supported by legal mechanisms and responsibility-attribution limitation devices. The analysis of coercion, above, argued that what Hayek terms "violence" is one of the most obnoxious forms of coercion. The prohibition of intentional physical violence is therefore probably the most important obligation in an abstract society and the rules forbidding its most important forms *must* dominate other competing principles. These are prohibitions of the most fundamental importance, as the existence of an abstract, and a *Gesellschaft*-type, society are predicated upon them. This cannot be emphasized too strongly. If the prohibitions on the most important forms of physical violence are not a common value to a society — if power and *solely* power is the basis of conflict-resolution, with one particularly important power being the ability to threaten or take the lives of those who oppose you — abstract relations in society crumble.<sup>50</sup> If one is not able to act knowing that abstract negative rules set out a sphere of action within which one is protected by recourse to social conflict-resolution mechanisms, one's actions become guided by the more concrete power relations of one's immediate surroundings — in particular, by threats and acts of physical violence. To emphasize this point in a different manner: being able to act on your own judgment and follow your own goals presupposes that conflicts between your goals and the goals of others are not resolved by physical violence. Arguments that there are no common values in society ignore this. Claims that there are no common values — none at all — rest upon a vision of society which is based upon a misunderstanding of the nature of abstraction and

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<sup>50</sup> Why? Because one's judgment would have to be based to a much larger degree on concretes and knowledge of one's particular environment, and such a restriction would imply a decrease in the complexity of one's actions and a decrease in the regularity of social action. This in turn would imply a decrease in the certainty one has about the outcome of one's actions in the present, and the increased necessity of continually being guided by considerations of particular moment and circumstance.



*Gesellschaft*-type social relations. There *is* commonality in a *Gesellschaft*-type society, but there is not *concrete* commonality. The individuals of a *Gesellschaft*-type society share certain minimal and predominantly negative abstract rules in common. Proponents of the view that there is no commonality are typically focused on relatively concrete articulated values. But at higher levels of abstraction, and in a performative sense, there is commonality between individuals in this type of society, even if it is only present in the commonalities of the conduct that individuals regularly do *not* perform.

Most other types of intentional coercion which are closely connected to intentional physical violence should be prevented. Communication, for example, is of great importance. Rules of conduct restricting communications should be based upon a substantive and direct connection to the principle prohibiting physical violence. It might be noted that the freedom to engage in “communicative action” itself rests upon a notion of coercion and implicitly assumes the prohibition of physical violence. The same would probably hold for interference with another’s thoughts. Prohibitions on interference with another’s movement are also important and violations, such as false imprisonment and arbitrary detention, would have to be prevented. Indeed, there are probably many more examples that one would have to add in order to constitute a comprehensive list of “desired” prohibitions in this category. But it is not the goal of this section to provide a detailed discussion of all of the forms of harm which should be prevented. The primary goal of this section is, rather, to stress the importance of keeping in mind the fundamental and primary role of prohibitions on physical violence, and to mention some of the other categories which are of some importance. There is no doubt that there are other forms of harm which can undermine the foundations of an abstract society. Thus, my list of forms of harm does not constitute a complete list (nor even a relatively complete list) nor is that the aim of this section to provide one. I have deliberately not considered the wide range of harm associated with lesser degrees of intentionality (recklessness, negligence, etc.), nor have I looked at all the areas another person might consider important. My reason for focusing on intentional and relatively important forms of harm is that I wish to stress the fact that their prohibition seems, in some senses, to be the necessary conditions for abstract social relations. I did not consider areas of lesser intentionality because these are areas of conflict where the competition between rules of conduct becomes more evenly matched and hence problematic (I considered the areas of intentional harm to be more one-sided, less evenly balanced, and hence easier to discuss relatively independent of their context — but even here the particular facts of a particular

case can be of decisive importance). What I do wish to stress is that interference or prohibitions of that which people consider to be most valuable to them — be it their bodily integrity, their thoughts, their speech, their religion, their sexual relations or reproduction, etc. — can undermine abstract social relations in that they can lead to methods of enforcement, and the discretion to enforce rules which are incompatible with such a societal form. This is an important point which, hitherto, I have not focused on but which is intimately connected with the theme of this chapter — that is, that the mechanisms by which one is governed are of decisive importance. The manner, then, in which social affairs are governed deserves the same careful attention and debate hitherto reserved for the discussion of goals and values. Goals and values do not live in a vacuum. Indeed, often times it is the *way* in which one strives to achieve them which plays a decisive role in determining whether one achieves them at all.

#### 14. The background assumptions underlying the notion of coercion

To conclude the constructive aspect of this chapter, mention must be made of four background issues which impact on the modified definition of coercion at work in the discussion above. The first of these relates to the perspective adopted by Hayek's — and this — work. The theory of coercion argued for in this work relates to *objective* (i.e. commonly-shared) obligations and does not extend to obligations which are more group-specific or concrete. Though these are undoubtedly important, they are not the focus of this study, nor (I believe) of Hayek's own notion of coercion.

The second point to mention is that the theory of this thesis focuses upon *conduct* which is connected to situations which are judged coercive. The reason for doing so is that this study is focusing on the way in which obligations are manifested in conduct. This is not to argue that "circumstances" cannot coerce. Rather, it is to emphasize that the emphasis of this study is upon the conduct which is connected to the changes in those "circumstances", and not to obligations over states of affairs which do not specify (or are vague in specifying) who will be responsible when the particular state of affairs occurs (or does not occur).

Third, it is important to realize that coercion is defined *within* a *pre-existing* order of conduct and social relations. Thus, coercion as defined in this work is not context-independent, nor is it independent of the social setting in which individuals find themselves embedded. In this thesis, the notion of coercion flows from pre-existing obligations upon

individual conduct which are *manifested in* individual conduct. As the environments in which individuals find themselves change, so too do obligations which are applicable in those environments.

Fourth, one must keep in mind that coercion is a *relative* concept involving a rank-order over various alternatives. There are no “absolutely” coercive acts independent of any circumstances, nor is it sensible to consider an act as “separated off” from all other acts and alternatives. Coercion must be considered within its social context, and the rank-order of obligations under examination at any one time depends upon the environments in which individuals find themselves and upon the other obligations which are presumed to be in effect.

Connected to each of these qualifications are issues related to the institutionalization of rules, and in particular, of positive rules. The discussion thus far has focused on the predominantly negative abstract rules of conduct governing an abstract society and their relationship to legal mechanisms and concepts. Now, while the discussion has focused on some general aspects of conflict, there has been no mention made of more specific issues associated with violations of the predominantly negative abstract rules of conduct governing society. In particular, there has been no examination of the role of positive rules of conduct which are associated with such violations. This has been quite deliberate, for before turning to this more particular issue I have felt it necessary to spell out the general implications and theoretical structure of the mechanism approach to law taken in this thesis. It would be remiss, however, to fail to consider, at least briefly, the role of positive rules in such a system. It is to this task that the chapter now turns.

## **15. Context and obligations**

The first aspect to be discussed relates to the importance of the context of rules of conduct. Most of the qualifications mentioned above stress the importance of taking into consideration the complexity of the environment within which rules operate. In particular, and in a similar argument to one made in the chapter on negative rules, all of these qualifications contribute to an understanding of why it might be misleading in some cases to base discussions of coercion, obligations, etc., upon what might be termed extreme social circumstances. Consider the nature of obligations in such environments. As harsher environments are considered, and as the “costliness” of conduct increases (in terms of its

implications for life and death) for a greater proportion of one's acts, obligations upon conduct *within the group* change in a subtle way. Negative obligations continue in effect, but they can come to conflict with positive obligations if some individuals are unable to themselves fulfil the minimal conditions for their continued existence. Thus, in extreme circumstances necessary conditions — and in particular, ones which require the performance of conduct — can come to assume a heightened importance. *If* the continued existence of the group is assumed, then the continued existence of members of that group is also of great importance. There are, then, arguments which can be made (and which I shall pursue in the chapter which follows) that minimal necessary conditions which require the performance of conduct have an important role to play. But it is important to emphasize that the *nature* of the obligation upon individuals' conduct also changes as the environment changes. In particular, as the social environment becomes more complex, and as the division of labour and knowledge grows greater, the effect of different types of obligations upon individuals' conduct becomes of increasing importance. If individuals are to be facilitated in their autonomous adaptations to increases in complexity, obligations must become increasingly abstract. But as previous chapters have argued, this implies that there must be an increasing resort to *negative* obligations. All of this implies that conclusions drawn from analyses of obligations operating in extreme social circumstances must be treated with caution. Focusing upon such conditions leads one to emphasize the importance of minimal positive obligations which must be satisfied if conduct is to occur at all. While these are undoubtedly of importance, it must be kept in mind that the further away individual and social action moves from a pre-occupation with the fulfilment of such conditions, the more important becomes an emphasis on the different governance properties of negative and positive rules.<sup>51</sup>

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<sup>51</sup> It might be added that the attribution of justice becomes problematic when minimal conditions are not fulfilled. Justice, in an important sense, presupposes that minimal conditions have *already* been fulfilled, in the sense that it must *generally* be the case that such minimum standards have been achieved (although not necessarily in particular cases) before one can talk about justice, which aims at the *preservation* of these minimal conditions. As Hume perceptively noted, "the strict laws of justice are suspended...where society is ready to perish from extreme necessity" (1966, 186). Thus, it does make sense to discuss issues of justice when, in *particular* cases, minimal conditions have not been fulfilled, for the function of rules of conduct and justice is to preserve such conditions *generally* across society. But if this lack of fulfilment should become more general and more widespread, it become problematic to attribute justice to acts, when such an attribution presupposes that minimal conditions are fulfilled when, in fact, they are not.



## 16. The definition of coercion and the role of institutionalization

The second aspect to be discussed relates to the definition of the term “coercion” and its relationship to positive rules of conduct. Each of the background issues mentioned above points to the conclusion that some of Hayek’s usages of this term are incorrect. Probably the most important example of this occurs when Hayek refers to the acts of legal and governmental institutions as coercive. Hayek’s argument, simply put, is that the only justification for governmental (and legal) coercion is the prevention of even more serious coercion (Hayek 1960, 144). The question is, however, whether the *enforcement* of shared rules of conduct of an abstract society, put into effect by positive rules of conduct, *would* constitute coercion. To do so, this enforcement would have to violate one of the abstract rules governing social interaction. The question is, then, whether enforcement necessarily does this. I would argue that the answer to this would have to be in the negative. But why would this be the case?

Up to now, the chapter has focused for the most part on the abstract notion of coercion in an abstract society. Consider for the moment a more concrete situation. Imagine there is a conflict in this society between, say, two individuals. Perhaps it is the case that each of these individuals views the other as violating what they consider to be their individual sphere. If the conflict satisfied the criteria which govern entrance to the institutional mechanisms of conflict-resolution found in the legal sphere, a judgment must be made as to which claim is valid and which is not. What has to be decided in the particular case, then, is which form of conduct as governed by shared abstract rules of conduct is of the higher rank and which is of the lower. Under these rules and mechanisms, higher ranking conduct should dominate lower ranking conduct, and once a judgment has been made as to the rank-order of the conduct in the particular case (i.e. once it is decided which individual has performed conduct of a lower rank than the conduct of the other), a system of *positive* rules come into play specifying what is to be done. The question of whether or not these positive rules are coercive depends upon their objectivity to the society in question. As they are positive rules, it is probable that in a complex society there will be broad agreement at abstract levels, with increasingly less agreement as concreteness increases. It is, however, not necessarily the case that these rules will infringe the predominantly negative abstract rules of conduct governing the individual sphere.

The key to understanding this claim rests upon an insight into the *sequential* nature of coercion. Individuals may perform certain acts which *if* performed without an *antecedent* coercive act would be themselves deemed coercive. Self-defence is one example. In some situations, once one has been coerced, one is able to act in certain ways to remove that form of coercion, and these acts, because of the antecedent coercion, do not themselves constitute coercion. But such self-help solutions are often ineffective in complex social environments. Moreover, the discretion of the individual as to how, and whether they wish, to pursue certain forms of harm often becomes restricted in more complex social spheres where one might find it increasingly difficult to consider the ramifications for others. It is at this stage that organized institutions of law, and those of the government which support legal institutions, enter the picture. In complex societies one resorts to centralized legal institutions to redress coercive violations of obligations, and these institutions typically depend upon a framework of governmental organization. On this view, the institutions (organizations) of law, and the governmental bodies which support them, manifest and instantiate positive obligations upon individuals. In a sense, these institutions are the focal point — the point of convergence — of various obligations which individuals acting separately would find difficult, if not impossible, to carry out.

Thus, although it is argued that there exist commonly shared and predominantly negative abstract rules of conduct which govern individual interactions, this in itself is not sufficient to explain how *violations* of these rules are addressed, nor how these rules of conduct are enforced in day to day life. Once a negative rule of conduct is violated, there must be a shared view that something should be done about it, and this leads into the realm of positive obligations and positive rules of conduct. Underlying the legal theory that I have outlined, then, are positive obligations that stipulate that there must be a resort to certain types of conflict-resolution mechanisms which are put into effect by particular individuals. In other words, there must be a general obligation that conflicts which violate the predominantly abstract rules of conduct be resolved using the mechanisms outlined in previous chapters.

Now, as I have argued previously, and as shall be argued in the later sections of this chapter, it is important to note that this does not say that there are certain individuals who are authorized to resolve conflict in any way they see fit, nor that they resolve it in ways that their peers within the institutional framework view as authorized. What it does say is that the individuals who are acting in such an institutional capacity should strive to implement the mechanisms outlined in previous chapters which allow for governance by abstract rules,

and that they should base their strivings on the minimal and predominantly negative obligations which underlie social interaction. Thus, it is not simply a matter of whether these individuals are “authorized” to pass judgment on conflicts which is decisive in determining whether or not their judgment gains a “legal quality”, but rather how adequately they put into effect, through the mechanisms which sustain abstract rule governance, the minimal obligations underlying social interaction. Thus, the “legal quality” flows not from an individual being empowered to resolve a conflict, but rather how closely their conduct conforms to the restrictions implied by the mechanisms of legality and the minimal obligations which underlie social life.

All of this goes some way to explaining why this chapter, and the thesis more generally, has focused upon the mechanisms which underlie conduct regularity, and why there has been a move away from institutional-level analysis. Moreover, it also points towards the reason why there is little mention of power-conferring rules, a rule-type that is of great interest to positivist theories of law. Within this thesis, institutional-level activity is intimately connected with individual-level activity external to these particular spheres. Moreover, the authority of such institutions flows from their conformity to the same mechanisms which govern individual conduct. Though such institutions are autonomous to a degree in their particular concrete acts, both the abstract governance framework within which such concrete acts take place, and the minimal obligations underlying action and social life which such a framework supports, are commonly shared between individuals, and substantive violations of this foundation will undermine both the autonomy and authority of any such institutional sphere. As we shall see in the sections that follow, such a vision of law is not undisputed. In particular, the positivist theory of law represents a strong competitor to the one presented in this thesis. Examining the foundations of its concept of law and the Rule of Law is the task of the sections that follow.

## **17. The questionable foundations of the positivist perspective**

Up to this point, the entire discussion has been concerned with the *principle* of the Rule of Law. In other words, the discussion has focused on the *theory* of the Rule of Law. It is important to distinguish clearly between the principle of the Rule of Law and its manifestations in practice, for if one is unclear on this point one might confuse theory with practice. That this is an important consideration can be seen by turning to an examination of

an alternative theory of the Rule of Law to the one outlined here — that of the Hartian positivist school of legal thinkers. Thus far in this chapter, I have outlined a framework for a mechanism model of law, and sketched the notions of the Rule of Law, justice and coercion which would be compatible with it. One should not assume, however, that such an interpretation of law remains uncontested. Indeed, what is probably the dominant school of thought in legal circles, legal positivism, presents a competing and in some ways incompatible vision of law to the one presented here. In the thesis thus far, this positivist notion of law — and in particular, the Hartian version of this theory which I focus upon — has emerged sporadically, in various unfavourable contrasts with the mechanism model of this thesis. Is it not time, then, to engage in a sustained and detailed examination of the positivist models of law and to spell out the similarities and differences between their notions of law and the one presented in this thesis?

However tempting it might be to engage the Hartian positivist models of law in a sustained critique of their details, this will not be the strategy of this chapter, nor is it the strategy of this work as a whole. On the contrary — my goal has been to engage not the details but rather the general themes of the foundational presuppositions which underlie this particular vision of law. The argument of this chapter will continue along these lines, and will elaborate the objections made in the last chapter to the legal theory of H.L.A. Hart. This argument put forward the view that Hart's theory of the "rule of recognition" was based on a misunderstanding. Hart's conception of law is flawed because it fails to take into account widespread, abstract and predominantly prohibitive performative forms of knowledge. Despite being termed a "practice theory" of law, Hart's theory is flawed because it emphasizes only the practices of a select group. The argument of the last chapter was that this is in fact the *wrong* group to consider, and that "practice" should instead focus upon longer-term negative regularities which individuals follow in their day to day conduct. Moreover, the stress should be on the mechanisms which support and generate these enduring regularities, with much less of an emphasis given to issues of authorization and the conscious, deliberate creation and application of articulated rules of conduct.

Continuing on this line of investigation, then, requires the highlighting of the foundations of the differences between the legal theory put forward in this work and the Hartian positivist vision of these same concepts. The argument of this work is that Hartian positivist legal theory embodies two implicit presuppositions which lead to its having fundamentally different properties from the theory presented in this thesis. The first of these



presuppositions is its view of social facts, while the second is its restricted epistemological focus. These two aspects are of course interrelated, as should be clear from the discussion that follows.

#### 18. Positivism's first error: the presumed existence of "social facts"

Hartian positivism is based on a theory of social rules and the authority associated with these rules. The difference between Hartian theories of law and the one of this thesis is that the former simply assumes that social rules and authority exist as a "social fact". That is, social rules and social authority are simply presupposed to exist as a matter of fact. These phenomena are taken as "given" facts which simply do (or do not) exist, and are the foundation upon which Hartian legal theory builds its elaborate theoretical structure. Our work, on the other hand, does not start with these "facts" as the foundation upon which a legal theory is built. Rather, the question of interest to this study is *how* these "facts" came into existence, and how are they sustained. Hartian legal theory presupposes the existence of the "social facts" of rules and authority without explaining or investigating how such rules arose or how they came to be authoritative. Hart's version of law simply presupposes the existence of "social facts" without considering the mechanisms which led to their *becoming* what they are.

Now, this critique of Hartian positivist theory should not be misunderstood. It is not arguing that this theory does not demonstrate the *particular* historical circumstances which have led to the existence of *particular* social rules and authority. Rather, the focus is upon the lack of any *theoretical* model which underlies the *formation* of regularity, social rules and authority. Simply taking regularity as a "given", and simply presupposing that some regularity is authoritative, ignores the fundamental question of why there is any regularity or authority at all. Hartian legal theory by-passes the question of how such regularity arises simply by assuming that it does. This move provides no insight into how such regularity is sustained, nor into the possible future consequences of present conduct upon such regularity. The lack of a mechanism foundation for such regularity and authority is a trademark of Hartian positivist thought, and produces what might be termed a theoretical blind spot, within which certain interesting questions remain unaddressed. For instance, *how* does behaviour converge into regularity? By what mechanisms? How does authority — in the sense of authority based on *shared* rules — come to exist? And how is it sustained? That

some rules of conduct are shared in common across individuals is a phenomenon which Hartian legal positivism presupposes to exist, yet Hartian theory seems to have no comment to make on how diverse rules of conduct might converge into common rules of conduct. In a sense, Hartian positivism presupposes its own foundations, and lacks an insight into the interactive effects which occur between these foundations and the structures which are built upon them.<sup>52</sup>

Tied up with this critique is an insight into what is sometimes called the “is/ought” split. From a cursory glance at the literature of legal theory, one could be led to believe that legal positivism’s dominant interest lies in the difference between that which is the case and that which ought to be (or ought not to be) the case. Positivists seem to assume that this dichotomy is of decisive importance, and that one of the primary goals of legal theory is to make a clear distinction between what the law is and what the law ought to be (or ought not to be). Now, such a distinction is indeed important — there is no denying this. But I would like to make clear what such a distinction does *not* address — this being the question of what I call the “could/is” split. Positivism’s focus on the difference between what is the case and what ought to be the case turns attention away from the question of how, for all of the potentiality that exists in the world, only some of it becomes actuality. The positivist focus does not address how the “could” becomes the “is”, for positivism simply assumes the “is” exists. There is no discussion of how potentiality is narrowed down by evolutionary selection, of how abstract rules evolve as adaptations to complexity, or of the filtering relationship between normative rules and potentiality. Instead, discussions typically assume that regularity exists, that there are ongoing orders of authority (for example, legal and moral), and that these ongoing orders are in competition. No mention is made of the sources of this regularity, of social rules, or of authority. Nor is the interaction and feedback between the underlying social regularity and these ongoing orders of authority given a sustained consideration. Such authority is simply presupposed to exist, seemingly independent of the mechanisms which generate and support it.

All of this might explain the Hartian positivists’ confusion about the concept of law and the principle of the Rule of Law, about which I shall have more to say in later sections. To characterize this confusion in general terms, one might say that Hartian legal positivists

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<sup>52</sup> In a sense, this echoes the complaint made by Fuller in his “A Reply to Critics” concerning positivism’s non-interactive, unilateralist, bias (Fuller 1969, 187-242).

presuppose that law and legal authority exist when there exists a regular relationship between the regular conduct of “ordinary” individuals and legal officials.<sup>53</sup> They then assume that an aspirational normative criterion — which they term “the Rule of Law” — is applied to this pre-existing law and authority. What they do not seem to understand, however, is that it is their assumption of the existence of “social facts” which leads them to assume that the principle of the Rule of Law is solely normative and aspirational in nature. Positivists restrict the principle of the Rule of Law to the aspirational sphere *because* they presuppose the factual nature of the regularity which forms the foundation for the *existence* of law and legal authority. To Hartians, law and authority pre-exist the principle of the Rule of Law.<sup>54</sup> One issue which these positivists do not address, however, is the existence of pre-conditions for regularity which forms the basis for the existence of law and legal authority. Nor do they consider that these minimal pre-conditions might themselves be associated with the restrictions which are embodied in the principle of the Rule of Law. Hartian positivism does not address this question, for it has, in a sense, assumed it away by presupposing the existence of regularity. Hart’s theory does not address the question of *how* regularity exists, for within his theory this is not a question at all — it is simply a “fact”. It either exists, or it does not. No notice is taken of the inter-relationship between this “fact” and the mechanisms which underlie it by transforming chaotic potentiality into regular actuality. Nor is there a consideration of the feedback effects of the conduct of “legal officials” which might clash with these mechanisms and this regularity. Regularity is simply a factual question, and its connection with the mechanisms which support it are outside the scope of this factuality.

Now, it might be argued that this argument claims too much, and that positivists are indeed interested in the mechanisms which provide the foundation for social regularity and legal authority. The work of Neil MacCormick, in particular, can be brought forward to support this view. A wide range of MacCormick’s work, most notably *Legal Reasoning and Legal Theory* (1978), investigates the processes of legal reasoning and legal argumentation, and it might be argued that this line of investigation is a positivist contribution to a mechanism approach to legal theory.

In a sense, this is correct. Neil MacCormick’s work is an important contribution to understanding the mechanisms which support regularity in legal argumentation, and I have

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<sup>53</sup> For example, see Hart’s statement on the “two minimum conditions [which are] necessary and sufficient for the existence of a legal system” (Hart 1961, 113).

<sup>54</sup> See, for example, Raz’s comments (1979, 211).

drawn upon this work in many of the discussions of earlier chapters. Nevertheless, there remain important differences between MacCormick's view of legal theory and the theory put forward in this thesis. To see this requires the introduction of the second implicit presupposition of positivist thought: its implicit epistemological bias and the results which flow from its adoption.

#### **19. Positivism's second error: the epistemic bias towards the articulated and the concrete**

One of the fundamental differences between the theory put forward in this thesis and that of Hartian positivists is the stress which each puts upon different types of knowledge. This difference in epistemic emphasis has important implications for the perspective of the respective theories of law and the Rule of Law, and also leads to a fundamentally different notion of rules and what it is to follow a rule. It is important, then, to be clear on this point.

Perhaps the best way of understanding this difference is to turn to an examination of the notion of a "rule of conduct". Thus far in the thesis, the existence of rules of conduct has for the most part simply been presupposed. Furthermore, with the earlier chapters of this work focusing on mechanisms which could generate rules of conduct, one might have gained the impression that rules of conduct were for the most part articulated, and created in a deliberate and conscious manner. This would be a misconception. As I shall argue in the final chapter of this work, while many investigations of these processes have tended to focus on their conscious and articulated manifestations, these mechanisms also exist in *unarticulated* form. Thus, the rules of conduct which these processes produce are in many cases unarticulated and are manifested solely in the conduct of individuals.<sup>55</sup> Moreover, one should not assume that these processes are restricted to the specifically institutional forms and legal settings stressed by MacCormick, for I am arguing that they are in widespread use among "ordinary" individuals.

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<sup>55</sup> This is a familiar theme in Hayek's work (1973, *passim*). As mentioned in an earlier chapter, it can be argued that this difference in approach can be grounded upon a different view of the foundations of knowledge, with the positivist approach adopting what is very much a propositional approach to knowledge, and with the Hayekian approach putting the stress on the performative and non-propositional nature of knowledge. Although this difference, and its consequences, does merit further consideration, this is neither the time nor the place to undertake it.



Restricting attention to articulated rules of conduct in institutional settings is a relatively familiar practice in legal theory. For example, though H.L.A. Hart's theory of law has been termed a "practice theory" of rules, built around a theory of social rules, this theory — and theories built up around it — tends to focus on articulated rules and their use in conscious deliberation and argumentation. The important issue from the point of view of this thesis is that these discussions stress the authority aspects of rules.<sup>56</sup> For example, Neil MacCormick's *Legal Reasoning and Legal Theory* (1978) tends to focus on the formulation and application of authoritative articulated rules through legal argumentation. Positivist legal theory in general tends to be implicitly biased towards the consideration of authoritative articulated rules formed by conscious deliberation and applied within institutional settings.

Now, a positivist might argue that once again I am incorrectly interpreting positivist theory, and that the vision of law and the Rule of Law of this work is not so different from positivist versions of this principle. After all, it might be argued that positivism focuses on the *acts* of recognition of authority by legal officials and experts — on how these individuals actually recognize that which is authoritative — and not necessarily on the articulation of these acts of recognition. If this is the case, and an argument can be made that it is, can Hartian positivist theory be reconciled with the approach taken in this thesis?

I would argue that it cannot. To see why this is the case, consider the question of *why* Hart, and Hartians more generally, focus on a restricted sphere of legal officials and experts. As I have outlined in the previous chapter, Hart restricts his view to this sphere based on an argument from complexity. This argument, roughly put, is that the division of labour and knowledge is of such complexity that "ordinary" individuals would not (without legal training) be able to know the criteria used by legal officials and experts to recognize acts as having legal authority. As I have argued previously, this argument rests on a misunderstanding, for it stresses *articulated* and *particularized* knowledge, and effectively ignores *abstract*, *performative* knowledge. It is important to realize that Hart focuses on a restricted group because of his bias towards articulated forms of knowledge (as opposed to performative forms) and his lack of insight into the fundamental differences between knowledge's abstract and concrete forms. Both of these points are related to his

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<sup>56</sup> In fact, Hart's theory goes so far as to *characterize* rules as being necessarily authoritative (Hart 1961, 54-59).

misunderstanding of the sources of social order, and the causal relationship between law and society, which is based upon the assumption that certain “social facts” are “givens”, i.e. are simply presupposed to exist. On these fundamental aspects, MacCormick does not differ from Hart. MacCormick also assumes that certain social facts provide the foundation for legal systems and that the mechanisms of reasoning which he examines operate *within* this pre-existing institutional sphere.<sup>57</sup> To MacCormick, as with Hart, the legal sphere comes to exist under the Hartian assumption of a congruence between the regular conduct of “ordinary” individuals and legal officials.<sup>58</sup> Moreover, both Hart and MacCormick assume the existence of different types of regularity for each of the two groups, i.e. “ordinary” individuals regularly act in conformity to the rules which the latter group identify as being legally authoritative.<sup>59</sup>

The approach of this thesis is somewhat different, for it focuses on the foundations of the regularity which both Hart and MacCormick presuppose to exist. This change of emphasis is important, for it allows one to consider the *interaction* between the regularity of “ordinary” individuals and legal officials.<sup>60</sup> An insight into the sources of regularity which are presupposed to exist also leads one to appreciate the existence of minimal obligations which have not been created by the design of any individual or group, but which underlie the foundations of social interaction. This insight into the existence of a pre-existing order of obligations is of decisive importance, for it leads to a fundamentally different perspective from the positivist view. Consider, for a moment, the differences between the two perspectives.

The positivist vision of law is based on the assumption that regularity exists. From this foundation of regularity flows both legal authority and normative restrictions over this authority. Positivists, then, presuppose that moral obligations *can* conflict with legal obligations *because* they presuppose a foundation of regularity which makes authoritative obligations a *possibility*. Only after this regularity is assumed to exist can obligations be differentiated into legal and moral spheres.

What, then, is the basis of this regularity which provides the foundations of all forms of authority? The argument of this thesis is that it is constituted of specific mechanisms which

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<sup>57</sup> See MacCormick (1978, 53-65; 1982, 44-59).

<sup>58</sup> In MacCormick (1978, 53).

<sup>59</sup> As in MacCormick (1978, 54-55).

<sup>60</sup> A point of particular importance to Lon Fuller (1969, 187-242) as noted previously.

are required to be in effect for regularity to exist. The activities of these processes *generate* and *sustain* regularity. Authority which rests upon a foundation of regularity, and the regular recognition of this authority, must rely upon these same mechanisms. The point of fundamental importance from the point of view of this thesis is that the mechanisms which generate and sustain regularity do not allow just any forms of conduct to be authoritative. Rather, these mechanisms impose pre-conditions on *any* and *all* forms of conduct which make a claim to be authoritative. Conduct which is authoritative and which bases this authority on the existence of regularity must conform to the restrictions imposed by the mechanisms which filter out irregularity and particularity. Conduct which claims to have authority must not be incompatible with these mechanisms, for these mechanisms are the source of the regularity which this authority presupposes to exist. Furthermore, for the conscious acts of recognition of authority to occur with regularity, there must be conformity to these same mechanisms.

## 20. Hartian positivists' vision of the principle of the Rule of Law

This emphasis on the sources of regularity and authority has important implications for discussions of the principle of the Rule of Law. In particular, an insight into the foundations of social order leads on to deviate from positivist theories of this principle in two important directions. First, positivist theories view the Rule of Law solely as a normative ideal. This is not the case in this thesis. Rather, this principle is seen as having two aspects: one minimal and one aspirational. Second, and flowing from this, these theories differ on their notions of rules and rule-following. Positivist theories stress articulated and deliberately created rules of conduct, and from this arises a fundamentally different notion of what it is to follow (to obey) a rule from the one found in this thesis.

The theory of the Rule of Law espoused by this thesis, and based upon certain themes in the work of F.A. Hayek and Lon Fuller, views the concept of the Rule of Law as consisting of two aspects: minimal and aspirational. The first prong of the Rule of Law focuses on the minimal conditions for the existence of law. These minimal conditions have been stressed in the previous chapters' focus upon various filtering mechanisms which eliminate particularity and positivity in their selection over rules of conduct. It is these mechanisms, and the rules of conduct which they generate, which identify acts as having, or more accurately not having, a "legal quality". The second prong of the Rule of Law consists of an

aspirational aspect: that is, the striving to perfect these minimal conditions. This is the explicitly normative aspect of the principle, in that it argues that individual conduct should be subject to the governance of abstract rules of conduct, and that this governance should be perfected in the directions specified by this principle.

Hartian positivist theories of the Rule of Law differ from this conception of the Rule of Law in that they view the principle of the Rule of Law *solely* as a normative ideal. The consequences of this are that these positivists use a different criterion for identifying the minimal conditions for the existence of law. In particular, these legal theories assume that the criteria which identify the existence of law are different from the criteria manifested in the principle of the Rule of Law. This means that to positivists the principle of the Rule of Law is not related to the necessary conditions for the existence of law or the “legal quality” of certain acts. As Raz puts it, the Rule of Law “is a political ideal which a legal system may lack or may possess to a greater or lesser degree” (Raz 1979, 211). This implies that law can exist even though it does not conform in the slightest degree to the principle of the Rule of Law and the requirement of regularity in conduct which this principle presupposes as law’s minimal pre-conditions. If one pushes this point a bit further, one could argue that Hartian legal theory seems to assume that law exists independent of the mechanisms which support it. Hartian positivism assumes that law comes into existence when there exists a regular relationship between the regularity of conduct by “ordinary individuals” and “legal officials” (Hart 1961, 113). As was pointed out previously, little mention is made of the sources of these regularities, nor of the mechanisms which govern their existence or preserve them. On this view, “authority” is simply asserted as flowing from the “social fact” that individuals regularly view certain conduct as authoritative, i.e. that certain conduct is not merely *able* to override other conduct, but is also in some sense *justified* in doing so. The source of this “social fact” remains, however, uninvestigated.

There is an implication of the positivist presupposition, that the principle of the Rule of Law is solely normative and aspirational, which deserves a comment. This is the fact that one of the “social facts” which positivism assumes to exist is the criteria for identifying the existence of legal officials and experts. Under the theory of law outlined in this work, legal officials would be those who put into practice the institutionalized mechanisms outlined in previous chapters. But what, then, is the positivist criteria for identifying legal actors? In other words, how does positivist theory explain the manner by which “legal officials” are differentiated from “ordinary” individuals? It would seem that positivists simply presume



that “legal officials” are differentiated from “ordinary” individuals by the simple “social fact” that this differentiation seems to be so recognized in practice.<sup>61</sup> To put this differently, positivists seem to be arguing that law is based upon the regular acts of authority recognition by legal officials. They also seem to be arguing that it is these same acts of authority recognition which differentiate “legal officials” from “ordinary” individuals. But is this not circular?

Indeed it is. Positivists seem to presuppose that it is a trivial matter to identify the participants to the practice of law. This, in turn, assumes that the practice of law is known in advance. But *how* is this practice identified? It cannot be the case that it is whichever practices are considered to be the ones under consideration by the group themselves, for the group has not yet been defined and indeed its very definition is based upon the definition of “practice”. It seems that there must be a core set of actions — a core set of practices — which must be recognizable if the concept of a “group” is to be defined. And what if there are different cores in competition with each other? *Which* is “the” group? How does positivism answer this question? Once a group is presupposed, practices are attributed to it. But the underlying question which remains unanswered is how one defines this group in the first place.

Positivism, then, seems to argue that acts are specifically legal because they are authoritative within a legal sphere and command obedience. This line of argument has been extended by Neil MacCormick (1974; 1982), who has argued that law can be distinguished by the explicitly institutional nature of its authority. The question which this raises, however, is how one defines the legal sphere, and how one differentiates between legal and other forms of institutional authority — such as political authority. A difficulty for legal positivism arises because it does not assume that a particular set of mechanisms are associated with the “legal quality”. Hence, positivists have difficulties differentiating legal

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<sup>61</sup> None of this is to say that some positivists have not recognized these vicious circles in their theoretical landscape. Neil MacCormick, for example, is one thinker who recognizes the difficulties the positivist view engenders (MacCormick 1978, 54-55; 1981, 108-111; 1996, 179-181) and who has tried, in *H.L.A. Hart*, to set down criteria by which legal officials could be identified (1981, 108-115), though by his own admission his attempt to “resolve this circularity through appeal to some kind of a quasi-historical analysis” was not successful (MacCormick 1996, 179-180). His latest argument, in which he reiterates Hart’s stress on the “practice-based, or customary, character of the validation of the ultimate rule” (MacCormick 1996, 181), might seem more promising, but it must be pointed out that numerous difficulties remain. These include the fact that (a) there continues to be little attention paid to the mechanisms which might explain *how* “custom” comes into existence and is sustained; (b) there is little insight into the relationship between such mechanisms and the properties they impart to certain “customs”; and (c), there is no mention made of the properties which distinguish these “customs” from other “customs” and allow them to produce a specifically legal form of “authorization”.

from non-legal institutional mechanisms, so long as they are both “authoritative”. Many of positivism’s difficulties come from this inability to distinguish the specifically legal nature of governance mechanisms. The view of this chapter is that these difficulties stem from an inadequate appreciation of the different properties associated with different mechanisms of conduct governance. Positivist theory has a mechanism vacuum, which is capable of being filled by whatever means are capable of establishing the regularity of conduct of “ordinary” individuals which is required as a necessary condition for the existence of law by a positivist legal theory. Thus, one troubling implication of this mechanism vacuum is that under the positivist vision of law the manner by which social regularity is generated is a matter of indifference (so long as this regularity is in conformity with whatever a select group regularly deems to be authoritative).

It is contended that this emphasis on law as institutionalized authority has two troubling aspects. First, the positivists’ attempts to distinguish the specifically “legal quality” of institutional authority by pointing to a distinct authority that resides with a specific group is problematic in that there remains a question as to how this group is identified. Even if one assumes that this difficulty can be surmounted, there remains a second difficulty which flows from the positivist notion of what it is that characterizes law. Positivists focus on the authority of a *specific* group, and it is important to realize that their notion of the “social fact” of the “authority” of law is a rather restricted notion. When Hartian positivists discuss the authority of law, they are concerned only with authority *within* the restricted sphere of legal officials. Thus, law need not be authoritative to “ordinary” individuals, nor (under the positivist definition of “rule”) need law consist of “rules” (in the sense of authoritative regularities) from the perspective of “ordinary” individuals.<sup>62</sup> To positivists, law is based solely on regularities which are authoritative to the select group of legal officials and experts. From the perspective of “ordinary” individuals, then, the acts which these legal officials and experts view as authoritative might have no authoritative foundation whatsoever. The pre-condition for the existence of a legal system for a Hartian positivism — this being the widespread conformity of conduct to the acts which a select group of individuals (legal officials and experts) identify as authoritative — is thus based upon the idea that “ordinary” individuals simply obey certain acts which a select group views as authoritative. As Hart points out, these identified acts are not necessarily authoritative to

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<sup>62</sup> Under the definition of a “rule” proposed by Hart (1961, 54-59).

“ordinary” individuals, but merely to the sphere of officials and experts.<sup>63</sup> In other words, to Hartian legal positivism, legal acts (from the perspective of legal officials) can at the same time be acts of unjustified power (from the perspective of “ordinary” individuals). Might this be the reason why both Lon Fuller and F.A. Hayek condemned legal positivism as the philosophy of managerialism and of elitist authoritarian control — for what is this view but an elaboration of the direction, by elite groups, of obedient “ordinary” individuals who do not share the elite group’s standards as authoritative in the sense of accepted standards of conduct which ought to be obeyed?

## 21. Positivism’s notion of a “rule”

Closely connected to this separation between “ordinary” and “official” perspectives is the next aspect of the positivist notion of the Rule of Law which requires investigation: their notion of a “rule” and “rule-following”. Consider their concept of a “rule”. As was implicit in the discussion above, positivist theory employs *two* closely related notions of “rules”. First, they refer to authoritative regularities of conduct which are used as standards against which certain conduct is compared and criticized. This is the notion of a rule as an authoritative regularity which, within positivist legal theory, applies to the internal perspective of a legal official. Call this the rules-as-authoritative-regularities notion of rules. This notion is similar but decisively different from a second one, which refers to authoritative articulations — authoritative either because they describe authoritative practice, or because they have been created in an authoritative way. Call this notion the rules-as-authoritative-articulations conception.

Now, there is a crucial point to note concerning Hartian positivism’s notion of a rule. The rules-as-authoritative-regularities notion presupposes the existence of social regularity in conduct as a pre-condition for the existence of an authoritative rule.<sup>64</sup> This view of rules is based on Hart’s theory of social rules, and is objectionable only insofar as it refers solely to legal officials and not to “ordinary” individuals. The same holds for the rules-as-authoritative-articulations notion, insofar as it refers to articulations of pre-existing social regularities (i.e. insofar as it *describes* authoritative practices). The problems arise for positivist theory when one considers rules-as-authoritative-articulations in its second sense,

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<sup>63</sup> Hart is quite explicit on this point (1961, 112-114).

<sup>64</sup> As in Hart’s discussion of the “rule of recognition” in “pre-legal” societies (Hart 1961, 91-91).

i.e. when it refers to articulations which have been *created* in an authoritative way.<sup>65</sup> This is objectionable for an additional reason. Consider the following. The first two notions of rules discussed above are based on practice, on existing performative regularities which individuals recognize as authoritative and upon which they based their criticisms of deviant conduct. Created articulations, on the other hand, have no such basis in practice. Such rules gain their authority solely from being created by practices which are themselves authoritative. The difficulty which arises for this notion of rules is that such rules have no basis in regular performance. Hence, there is no guarantee that such rules are *capable* of generating regular conduct. This is a point of decisive importance. The two other forms of rules are both based on existing regularities of conduct, and in a sense flow from this pre-existing regularity. Though positivism does not focus upon *how* this regularity comes about, positivists can at least argue that the fact that people do in fact act in a regular way *might* be one ground for assuming that they believe they *ought* to (this is one way of viewing the positivist pre-condition of “efficacy”).<sup>66</sup> Rules which are created without such a performative basis have no such regularity of conduct to fall back upon. They are, in a sense, much more conceptually based, and represent a larger distance between the “ought” and the “is”.

Thus, under one notion of “rules” emphasized by positivists, a gap opens up between theory and practice, i.e. between the realm of the conceptual and its implementation in performance and practice. This gap is of great importance, for rules-as-created-authoritative-articulations can conflict with the foundations of authority which positivism presupposes. That is, these articulations might conflict with the minimal obligations which underlie the processes which allowed such rules to gain authority in the first place. If it is forgotten that legal institutions presuppose a foundation of social regularity and social authority, and if the pre-condition of performance and regularity in conduct has been removed from the definition of “rule”, *any* particular content can be added to an articulation. Without subjecting the articulations of potential rules of conduct to the filtering mechanisms of the previous chapters (which strive towards the elimination of particularity and the generation of abstraction), the results can be rules of conduct which are neither abstract nor

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<sup>65</sup> See Hart’s evolving notion of the “rule of recognition” examined in the previous chapter (Hart 1961, 111-112).

<sup>66</sup> Or for at least making the “presupposition” that they believe they ought to, if one were to frame this in a Kelsenian way.



conducive to the preservation of abstract social relations.<sup>67</sup> Thus, a large gap between potentiality and performance accentuates the importance of being clear about which mechanisms will be used to put these articulations into effect. If there is a large gap between what individuals do and what the articulations demand of them, there is a consequent need for mechanisms which will be used to ensure that a convergence occurs between potential and actual conduct. It is thus all the more important to specify clearly what precisely the properties of these mechanisms are which will ensure such a convergence.

Now, while positivists do not emphasize the mechanisms which implement rule governance, they do seem to recognize that an ever increasing gap between those rules legal officials recognize as authoritative and “ordinary” individuals’ conduct would spell difficulties for any theory of law. Thus, while they do not directly examine the mechanisms which ensure such a convergence takes place, they do address this issue in two related ways. First, they argue that legal rules *are* subject to the demands of individual morality.<sup>68</sup> The positivists argue that if individuals find legal rules objectionable “enough” on moral grounds, they might no longer obey them.<sup>69</sup> Second, and closely connected to this, is the positivist presupposition of “efficacy”, i.e. that for law to exist individuals’ conduct must predominantly conform to the rules which legal officials recognize as authoritative.<sup>70</sup> Hartian positivists argue that such conformity is a necessary condition for the existence of a legal system and law.<sup>71</sup> In a sense, the efficacy pre-condition is an attempt to import normativity in the guise of factuality. By making efficacy a necessary condition for the existence of law and legal systems, positivists implicitly presuppose that for law to exist the rules which are recognized by legal officials as being authoritative are in fact of sufficient authority to “ordinary” individuals such that they dominate other rules of conduct which may make a claim to these individuals’ obedience. The problem with this assumption — and more generally, with the positivist notion of law — is that there is no mention made of the *sources* of the dominant authority of legal rules over other rules of conduct. Positivists make no mention of *how* legal rules could come to dominate other social rules, but instead simply presume that for law to exist they do in fact dominate these other rules. In this way, then,

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<sup>67</sup> Especially if the term “abstract” is taken to refer to the mode of expression of a rule, and not its reference. For more on this, see the discussion of Jackson’s implicit notion of the abstract in chapter four.

<sup>68</sup> I suspect one would be hard-pressed to deny that this is a familiar theme in Hart (1961; 1983), MacCormick (1978; 1981; 1982) or Raz (1979; 1994).

<sup>69</sup> Hart’s eloquent statements on the matter are representative of this view (Hart 1961, 195-207).

<sup>70</sup> See Hart (1961, 100-101).

<sup>71</sup> As in Hart (1961, 113), MacCormick (1978, 55) and Raz (1975, 125-126; 1979, 102-103).

positivists assume that legal rules have *some sort* of dominant normative force to individuals, but do not say from where this force arises, nor in what ways it is sustained.

All of this is related to positivist arguments which restrict the recognition of legal authority to a select group of legal officials. As argued above, when a positivist talks of legal authority, they have two different notions in mind. First, there is a notion which applies to legal officials. These officials accept legal rules as authoritative in that these rules constitute standards of criticism when deviations from these rules occur. Second comes a notion which is different from that of legal officials, and which applies to “ordinary” individuals. These individuals might view legal rules as simply being the imposition of power which lacks authority (in the sense of being accepted standards for conduct).

These two different senses of “authority” expose Hartian legal positivism as a theory which is amenable to top-down direction and to the imposition of unauthorized power of one group over “ordinary” individuals. This brand of legal positivism cannot exclude such a scenario, for this theory makes no connection between the authority recognized by legal officials and that recognized by “ordinary” individuals other than through an efficacy precondition which simply assumes that for a legal system to exist there must be a mass conformity to the rules recognized as authoritative by a select group of legal officials. Hartian legal positivism does not explain *how* such conformity arises, nor does it specify the mechanisms by which such conformity is sustained. This mechanism vacuum implies that Hartian legal positivism cannot close the door on the variety of mechanisms which are incapable of sustaining abstract social relations or the complexity which abstract and autonomous governance enables. This is a legal theory which has lost its way, in that so long as “ordinary” individuals conform to the rules which legal officials recognize to be authoritative — and independent of *why* “ordinary” individuals conform to these rules — law is said to exist. That this is merely the imposition of unjustified power of some over others, and that there is nothing specifically legal about such an imposition, seems to have been passed over completely.

As I have mentioned above, the positivist assumption of efficacy can be interpreted as an attempt to rule out the possibility that a legal system becomes nothing more than a select group imposing its power over others. Efficacy implicitly imports the idea that legal rules are *in some sense* authoritative to individuals, in that these rules as manifested in actual

conduct which overrides other rules of conduct.<sup>72</sup> But this is not the same sense of “authority” which applies to legal officials. This divergence between notions of authority is where the problems for their theory emerge, and it is this separation which reveals the inadequacy of the positivist attempt to use efficacy as a filter over self-undermining “authoritative” rule-systems. Positivists are not able to rule out select groups wielding non-authoritative power over others (in the sense that the select group implements standards which *they* “accept” as authoritative bases of criticism, but which are not so “accepted” by those to whom the rules are applied). Instead, positivists can only rule out scenarios in which legal rules are not authoritative in the sense that “ordinary” individuals do not conform to them in their conduct. That this is not sufficient to distinguish the legal sphere from other forms of institutional authority should be obvious by asking the question “and how is legal order distinguished from the order imposed by a gang of thugs?”. Under the positivist notion of law, there is no distinction to be made — so long as “ordinary” individuals actually conform to a “sufficient” degree to the rules which a select group (in this case, a gang of thugs) deems to be authoritative. The question of *how* such conformity comes about, be it through the barrel of a gun, or some other means, seems to be completely ignored.

## 22. Positivism’s notion of “following a rule”

Closely connected to all of this is the positivist notion of what it is to follow a rule. As I have argued previously, the positivist notion of a rule tends to emphasize authoritative articulated rules. Under this notion of a rule, individuals are viewed as following rules when their behaviour conforms to these authoritative articulations. In itself, this might be of little importance, but combined with two other tendencies, it has significant consequences. The first tendency is positivism’s lack of emphasis on the distinction between rules governing states of affairs and rules dictating conduct. The second tendency, interconnected to the first, is the lack of attention paid to the difference between positive and negative rules of conduct. Taken together, and combined with a focus on authoritative articulated rules, this view of rules leads to some rather disturbing implications.

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<sup>72</sup> Positivists do not comment on the sources of this authority, other than to say that they might be manifold and differ across individuals, as in Hart (1961, 198-199). Nor do they comment on how this authority is generated or sustained. Instead, such authority is simply assumed to exist (or to not exist) as a matter of “(social) fact”.

When one considers positivism's emphasis on authoritative articulations which might have no basis in regular conduct, and the lack of emphasis on both the difference between rules of conduct and rules governing states of affairs, and positive/negative rule of conduct distinction, one can make the argument that this view takes very little interest in *how* rules are satisfied. Rather, its focus seems to be on whether or not they *are* satisfied. This bias towards the factual question of rule-satisfaction, in part based upon an overemphasis on states of affairs and an underemphasis on the conduct leading to these states, flows from positivism's general lack of concern over issues of conduct governance. How rules are satisfied seems to be of much less interest than whether or not such rules are satisfied (or whether they are "authorized"). Positivism, then, focuses more on what *is* the case, and less on how potentiality *becomes* what is.

This general bias towards issues of actuality and existing authority (and general disinterest in issues of potentiality and the foundations of authority) manifests itself in other aspects of rule-following. Positivists focus on whether an authoritative rule is conformed to in conduct, but they do not ask whether such a rule generates regularities of social conduct. Nor does positivism inquire as to whether obedience to the authoritative articulated rule *is capable* of producing regularity in individual conduct considered as a whole. All that is considered is whether individuals conform to the particular articulation and whether the articulation is "authorized"; the effect on conduct regularity more widely considered remains uninvestigated. Thus, on this "localized" notion of rule-following, an individual may conform to an articulation which renders much of their other conduct less regular. Similarly, an articulation may be conformed to by individuals and yet conformity to this same articulation may decrease social regularity more widely considered. Finally, it may be the case that regularity of conduct comes about because of a variety of means, some of which contravene the minimal obligations necessary for social interaction, or which undermine abstract social relations — and yet so long as individual conduct conforms to the articulated rules, positivists consider individuals to be "following a rule".

The problem with the positivist notion of rule-following is that there is a decided lack of insight into *how* rule-governance actually takes place *over time*. Rules as authoritative articulations are emphasized, and the questions of how these articulations come to be conformed to, and whether such conformity is conducive to the preservation of legal authority, are considered to be of less interest than the factual question of whether or not they *are* conformed to. Yet how individuals come to conform to articulated rules is of



decisive importance, for the methods by which this comes about are intimately related to the issue of the authority structure of society. Moreover, some mechanisms for generating “regularity” are not capable of sustaining the regularity, authority, and complexity which is often simply presupposed by positivists to be matters of “social fact”. “Regularity” from a positivist perspective is often simply a matter of fact and of authority, with the question being “are the rules which legal officials recognize as authoritative actually conformed to in practice?”. The question which is not asked by positivists, but which is of critical importance for their enterprise, is “are the rules which legal official recognize as authoritative capable of maintaining their authority through sustainable social practice?”. Positivism skirts this issue by focusing on the narrow question of whether certain conduct conforms to a rule which is presumed to have authority, and avoiding the more general questions of whether the rule is capable of generating regularity of conduct or of sustaining the authority which is presumed to underlie the rule. They do this, presumably, to preserve their interest in keeping the issue of identifying law “factual”. In actuality, however, this interest is undermined by a comprehensive misunderstanding of the nature of factuality in complex interactive systems of human conduct.

### **23. The positivist dilemma**

Where do the positivist presuppositions lead legal theory? My claim is that the foundations of positivist legal theory are fundamentally flawed, and that as a consequence of this the positivist theory of law finds itself in a difficult position. This is perhaps best illustrated by considering the Hartian positivist answer to a question introduced earlier in the chapter: what is the difference between the legal order and the order generated by a band of thugs? The implications of their answer to this question can be spelled out in simple terms. Hartian positivists argue that legal authority can be restricted to a select group of individuals — legal officials. The problems with such a view are twofold. First, law ceases to have the same obligatory nature to legal officials and to “ordinary” individuals. Legal officials “accept” the authority of the law in that they accept its rules as standards for conduct which are deserving of criticism if deviations occur. To legal officials, law is authoritative because its rules should be obeyed and are the accepted standards for the criticism of deviations. This is not the case for “ordinary” individuals. To them, these acts might have no obligatory character in that these individuals might not view them as justified

or accepted standards for conduct. Individuals *do* obey these acts (the positivist assumption of efficacy deals with the relationship between this condition and the existence of law) but they do not necessarily view these acts as authoritative, nor as obligatory in the same sense as legal officials. The upshot of this is that under the positivist notion of law, law can become an instrument of non-authoritative power, imposing its acts on “ordinary” individuals.

The second difficulty with such a view comes when positivists are pushed to distinguish law from other institutional forms of authority. If positivists do not argue that law is something more than that which is considered to be authorized by a select group of individuals, they run into the difficulty of distinguishing the legal from other institutional forms of authority. How, for instance, are legal actors to be distinguished from non-legal ones? And how is legal authority to be distinguished from authority’s other forms — and in particular, its political forms? Positivists cannot argue that law must be implemented in conformity with the principle of the Rule of Law, for as I have already noted, they are quite explicit in their statements that law can exist even though it does not conform in the slightest degree to this principle. But what, then, distinguishes the legal from the political?

Now, positivists could argue that legal acts are considered to be authorized by “ordinary” individuals, in the sense that these individuals accept the rules of law as justified standards of conduct, but if this is the argument the positivists remove legal authorization from the exclusive sphere of legal officials and base it on criteria which are more widely held in the population at large. Positivists decline to do this, and one might guess the motive behind this is that such an extension renders the “factual” identification of law a much more daunting task. Such a move also has the potential to expand the set of criteria, which are used to identify acts as being legal, to encompass moral principles — and positivism’s emphasis on factual criteria, and the separation of the legal from the moral goes against this.

This, then, is the positivist dilemma: by retaining the restriction upon those individuals who are capable of judging what is legally authoritative, law has the potential to become an instrument of unjustified power which is difficult to distinguish from other modes of power; by abandoning the restriction upon those who are capable of identifying a “legal quality”, they potentially undermine their tidy distinction between the legal and the moral, and their claims that law can have “any sort of content”. If law is to be distinguished from the order generated by a band of thugs, it must have authorization to those whose conduct it guides. But, if it is to have such authority, it must conform to what those same individuals hold to

be authoritative. Positivists try and get around this difficulty with their pre-condition of “efficacy”. This pre-condition assumes that individuals *do* hold legal rules to be authoritative (because for the most part they obey *legal* rules when these rules conflict with other standards the individuals accept), but the point to be noted is that they do not necessarily accept legal rules as standards of conduct which *should* be obeyed. In other words, individuals act as legal officials believe they should, but these same individuals do not necessarily hold that their own conduct is as it should be. That this is simply an imposition of unjustified power by some onto others does not seem to bother positivist theorists. What should be more worrying, however, is how positivists manage to differentiate such social order from that imposed by a band of thugs. This is part of a more general question of how positivists manage to identify and distinguish legal actors from non-legal actors, and how law is to be distinguished from power in its other forms.

#### 24. Conclusion

I have argued in general terms in the later sections of this chapter that Hartian legal positivism is flawed at its very foundations. Though Hartians begin on the right track by stressing the internal perspective of individual actors, they are soon derailed by their untenable epistemological biases and their premature elevation of certain social regularities to the status of “social facts”, both of which lead to their restricting legal authority to a select group of officials. Though the positivist perspective claims that it is a “practice” theory of law, the practices which Hartian positivists deem to be most relevant to legal theory are those of a select group of legal officials. Positivists emphasize “authority”, yet their notion of authority is restricted to the set of legal officials and experts who in their view constitute the legal sphere. Positivists emphasize rules, yet their notion of rules as authoritative articulations excludes the consideration of whether or not these articulations are capable of generating or sustaining the social regularity (and authority) positivists presuppose to exist. Finally, positivists emphasize an “is/ought” split, yet they ignore the foundations of actuality and neglect to consider the interaction between fact and value which is of decisive importance to the generation and preservation of social order.

These errors stem from a comprehensive misunderstanding of the nature of social order and the epistemological foundations of human conduct. The limitation of the legal sphere to legal officials and experts and their emphasis on articulations flows from an overemphasis

on conscious deliberation and creativity. This in turn is based upon a mistaken notion of how individuals come to conduct themselves with regularity. Positivism simply assumes that regularity exists, but exhibits little interest or understanding of *how* such regularity comes to exist, nor of how it is sustained. Nor does positivism have an insight into the interaction between its own foundations and the structures which are built up upon this. Positivist legal theories generally ignore these interactive effects, and more specifically assume that the legal sphere is autonomous from, or causally imposing upon, the regularity of “ordinary” individuals. This is one aspect of the oft-repeated positivist claim that “the existence of law is one thing; its merit or demerit another” (Austin, quoted in Hart 1961, 203). Positivist theory presupposes that the existence of law depends upon a foundation of regularity of “ordinary” and official conduct, but provides no explanation of how these regularities interact or of how what the positivists denote as the legal sphere might lose its autonomy. It is contended, then, that the claim that law can have “any kind of content” (Kelsen, quoted in Hart 1961, 203) is based on a misunderstanding of the nature of social regularity and the causal connection between law and society. That this occurs is a direct result of the positivist focus upon articulated and conscious knowledge, combined with their premature elevation of certain forms of conduct to the status of “social fact”. This combination effectively eliminates inquiries into the interaction between the mechanisms which support the generation and continued existence of these “facts” — including the factual existence of morality — and more generally stultifies the examination of the inter-relationship between fact and value, and between minimal pre-existing obligations and the existence of social order and authority.

All of this has implications for legal theorizing. The general message of the first segment of this chapter is that legal theory could profit from examining the foundations upon which law and legal systems rest. In particular, legal theory could benefit from an increased awareness and understanding of the foundations of conduct regularity at an individual level. To this end, the first segment of the chapter focused on how conduct regularity is maintained through various mechanisms which generate rules and resolve conflicts at the individual level, and how these mechanisms were related to two concepts which are central to legal theory — justice and coercion. The argument throughout the chapter has been that in an abstract, *Gesellschaft*-type society, conduct regularity is based upon individuals following commonly shared and predominantly negative abstract rules of conduct. It is these



commonly shared rules of conduct which provide the foundation for objective judgments and conflict-resolution, and hence for objective notions of coercion and justice.

Such a striving for objective conflict resolution is not without its costs. The argument of the next chapter investigates the restrictions which a striving for objective judgments imposes on conduct governance mechanisms. As we shall see, this has important implications for the notion of distributive justice, and for the forms of action which can achieve a “legal quality” in an abstract, *Gesellschaft*-type society.

## The Moloch of Abstraction

### A Hayekian perspective on distributive justice

#### 1. Introduction

The analysis of previous chapters has emphasized that there exists a wide disparity between a Hayekian vision of law and what one might term traditional legal theory. Nowhere is this difference in perspectives more apparent than in discussions of Hayek's criticisms of social justice. Discussions in this area have generated a lot of heat, but often times, relatively little light. This might not be surprising, given that the underlying presuppositions of Hayek's various commentators, compared with Hayek's own, are often so greatly at odds that there is, in my view, often relatively little to be gained by turning to a detailed consideration of the critical commentaries in this area.

It is of some importance, then, to spell out what Hayek meant by his various objections to the notion of social justice. Part of the task undertaken in this chapter is to retrieve at least some part of this concept from the conceptual flames to which Hayek consigned it. Unlike Hayek, I am not opposed to the concept of social justice and its realization, nor do I find it to be unintelligible. This being the case, I believe it is necessary to at least attempt to rescue aspects of this notion from the jaws of the Moloch of Abstraction. Nevertheless, I expect that many readers will find the analysis of this chapter objectionable in that it may seem to demonstrate the opposite. That this might be the view that is taken, however, merely serves to emphasize once again the gap which exists between the perspective taken in this thesis and that of traditional legal theory. The idea seems to be that any analysis of social justice must be focused on the *ideal* that it represents, and that any restrictions which are placed on this goal must be contrary to the ideal of achieving social justice. This is, I think, a mistaken view. This chapter is not interested in questioning the *value* of social justice (for it simply takes it as a desirable "given"), but it is interested in stressing the importance of *how* this ideal is achieved. This emphasis on a *mechanism* approach to social justice represents a

turning away from a consideration of the “good” and the “bad” aspects of this concept, and a move towards the analysis of how this ideal (however desirable or detestable it may be) manifests itself in practice. It is precisely this issue which has received little attention in considerations of Hayek’s criticisms of social justice, and hence it is this topic which will be examined in some detail in this chapter.

## 2. Some notes on terminology

Before turning to an examination of Hayek’s objections to distributive justice, one should be warned of a potential terminological pitfall. It is very important to note that Hayek equates “distributive” justice with “social” justice.<sup>1</sup> While Hayek does focus on other aspects of social justice concerned with what he calls simply “justice”,<sup>2</sup> to him this “justice” is another, separate concept, equally social<sup>3</sup> but not a type of social justice. Consequently, when Hayek objects to social justice he is only objecting to the distributive forms of that concept. To emphasize the limited scope of Hayek’s objections, the chapter for the most part uses the term “distributive justice” when reviewing his arguments.<sup>4</sup>

This is a significant point. At the time of Hayek’s earliest ventures into law, legal positivism in the sense of Kelsenian positivism was at high tide, with the notions of “objective” justice and positivist notions of legality being effectively *equated*.<sup>5</sup> With this being the case, it is not surprising that individuals concerned about justice should resort to a different term to express their belief that objective justice was not to be equated solely with the workings of an existing legal system, and hence the emergence of a “new” form of justice: “social” justice.<sup>6</sup> The creation of the term social justice, then, might be seen as a *response* to the specious equation of positivist notions of legality with “objective” justice. If this were the case, it is not surprising that many of Hayek’s critics — and many of his

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<sup>1</sup> As is pointed out in his discussion (Hayek 1976, 63).

<sup>2</sup> Or, what might be termed “commutative” justice, although as Hayek has commented, there is probably little to be gained by “[tying] up the discussion with all the difficulties and confusions which in the course of time have become associated with these traditional concepts” (Hayek 1960, 441).

<sup>3</sup> As Hayek puts it when commenting on the phrase “social justice”, “one would have thought that all justice is a social phenomenon” (1967, 83).

<sup>4</sup> Though it might be noted that this usage should not be taken as an endorsement of the view that *all* issues of social justice are distributional in nature.

<sup>5</sup> See, for example, Hayek’s somewhat misleading quotation of Kelsen’s statement that “just is only another word for legal or legitimate”, (Kelsen 1934, 482, quoted in Hayek (1976, 169).

<sup>6</sup> For more on this, see Hayek’s own insights concerning the history of this term (Hayek 1967, 237-247; 1976, 62-64).

admirers — have been deeply disappointed with, and angered by, his attacks on the concept, for to them the elimination of this term might imply a reversion back to the objectionable view that “objective” justice was equivalent to positivist notions of legality.<sup>7</sup>

This is perhaps one side of the story, but it is not the whole story. More to the point would be the fact that Hayek expressed a distaste for the concept of distributive justice which was associated with social justice, and it was Hayek’s attack on this concept that disappointed some and angered many. At times Hayek seems to argue that the concept of social justice is superfluous.<sup>8</sup> The argument made above is that social justice might have been a term created to express an objection to the positivist conflation of justice with their notion of legality. For Hayek, however, the equating of the positivist form of legality with the notion of objective justice was never valid, and hence the creation of a “new” term expressing the fundamental idea that objective justice was different from such forms of legality was not necessary. Because it was unnecessary to create such a term, once such a term was created, it became a catch-all for a wide variety of concepts and critiques, one of them being another concept of justice — distributive justice.<sup>9</sup> Hayek’s objection to distributive justice is based on the claim that, in a complex society, it is incompatible with the belief in, and the possibility of, objective justice. To Hayek, if social justice were conflated with justice, when actually it was identical to distributive justice, people would come to believe that justice could not be objective (for Hayek believed that in a complex, abstract society, distributive justice *could not* be objective).<sup>10</sup>

It perhaps might be advisable to argue that the concept of social justice is (at least) two-pronged: one notion embeds the idea of distributive justice, while another manifests the opposition to the early positivist equation of objective justice and legality. This would seem to be a reasonable argument, and it would not be surprising if the second prong contains elements of objective justice. Be that as it may, and although one may find Hayek’s attacks on the ideal of social justice regrettable (as I do), what must be emphasized here is that

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<sup>7</sup> As well, many writers have been disappointed that Hayek seems to be ruling out the *possibility* of distributive justice. As we shall argue, this is not Hayek’s argument. Rather, Hayek is ruling out the use of particular *methods* of achieving distributive justice as incompatible with an abstract, *Gesellschaft*-type society. He is not, then, ruling out *all* of its possible forms.

<sup>8</sup> He makes his most forceful argument for this position in *Law, Legislation and Liberty*, vol. 2, *The Mirage of Social Justice* (1976).

<sup>9</sup> This point is underlined in Hayek (1976, 96-100).

<sup>10</sup> See Hayek’s comments concerning the loss of belief in the possibility of objective justice in *Law, Legislation and Liberty* (1973, 2), and his later discussion of this point (Hayek 1976, 42-44).



Hayek, in his many critiques on “social” justice, is focusing solely on the distributivist aspect.

This brings me to a second point. I believe it is a mistake to lump all of the various notions of distributive justice into a single concept, as one might accuse Hayek of doing.<sup>11</sup> Distributive justice comes in a variety of forms. As shall be argued, Hayekian objections to distributive justice are aimed only at those notions which would entail a repeated resort to concrete mechanisms of conduct governance and concrete knowledge. More abstract methods, based on rules which can be applied to all individuals and which do not require the resort to individual-specific judgments, do not in my view fall under such a critique. In fact, it can be argued that Hayek does not view such notions as falling under the notion of distributive justice at all. This is, I think, an error, for the *goal* of distributive justice *is* present, although the means for achieving that goal are not the ones that Hayek, and this thesis, would find objectionable.

Be that as it may, Hayek’s objections to distributive justice do seem to be based on the idea that such a concept would involve concrete mechanisms of conduct governance. It is to *these* forms of governance that his objections are directed, and it is his mistake not to emphasize this point more clearly. In the text that follows, then, it is important to keep this point in mind, for although Hayek’s criticisms are often directed at the concept more generally (especially his intelligibility critique which is discussed later in the thesis), it is only to the mechanisms — the methods — of achieving distributive justice that these objections actually apply. As I shall argue briefly later in the thesis, this implies that in some cases more abstract mechanisms for achieving certain conceptions of distributive justice do *not* fall under the Hayekian objections to this notion.

### 3. Hayek’s objection is a mechanism objection

Hayek, then, is objecting solely to certain conceptions of distributive justice, and not to other aspects of social justice. To be more precise, the claim is that for the most part Hayek is criticizing the *mechanism* under which schemes of distributive justice are implemented. His rejection of distributive justice is based on the *way* in which it is achieved, rather than

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<sup>11</sup> For a fascinating discussion of the various meanings taken on by the term “equality”, and for their impact on arguments of distributional justice, see Westen (1990).

upon the goal of distributive justice itself. To Hayek, the “problem here is not so much the aims as the *methods* of government action” (Hayek 1960, 258, my italics). Thus,

[t]here is no reason why in a free society government should not assure to all protection against severe deprivation in the form of an assured minimum income, or a floor below which nobody need to descend. To enter into such an insurance against extreme misfortune may well be in the interest of all; or it may be felt to be a clear moral duty of all to assist, within the organized community, those who cannot help themselves. So long as such a uniform minimum income is provided outside the market to all those who, for any reason, are unable to earn in the market an adequate maintenance, this need *not* lead to a restriction of freedom, or conflict with the Rule of Law. The problems with which we are here concerned arise *only* when the remuneration for services rendered is determined by authority, and the impersonal mechanism of the market which guides the direction of individual efforts is thus suspended. (Hayek 1976, 87, my italics)

In other words, there is an

important distinction...to be drawn between two conceptions of security: a limited security which can be achieved for all and which is, therefore, no privilege, and absolute security, which in a free society cannot be achieved for all. The first of these is security against severe physical privation, the assurance of a given minimum of sustenance for all; and the second is the assurance of a given standard of life, which is determined by comparing the standard enjoyed by a person or a group with that of others. The distinction, then, is that between the security of an equal minimum income for all and the security of a particular income that a person is thought to deserve. (Hayek 1960, 259)

Hayek is thus concerned with the conflict between mechanisms of distributive justice and the principle of the Rule of Law. It is important to keep in mind that by the principle of the Rule of Law, neither Hayek nor this thesis refers to a meta-legal principle whereby any rules or commands issued by some authority are considered to be rules of law. Such a version of Rule of Law *would* be amenable with much wider notions of distributive justice. In fact, Hayek claims that “[o]nly if one understands by law not the general rules of just conduct only but *any* commands issued by authority (or any authorization of such commands by a legislature), can the measures aimed at distributive justice be represented as compatible with the rule of law” (Hayek 1976, 87). Neither Hayek nor this thesis subscribes to the notion of the Rule of Law which is grounded upon a foundation of authorization. Rather, the principle of the Rule of Law to which we are referring is the one elaborated in the previous chapter — one based on shared, minimal and mainly negative values and obligations which are put into effect by the various mechanisms described in the previous chapters of this work.

Under this notion of the Rule of Law, the rules of distributive justice cannot be rules of law if they are “too” concrete, and in turn, that they are “too” concrete if they cannot sustain abstract social relations which are of particular importance in forming the foundations for a *Gesellschaft*-type society (which Hayek refers to as a “Great Society”<sup>12</sup>). This excessive particularity is revealed by the fact that these rules cannot pass through the filters embedded in legal mechanisms which are supportive of an abstract society. Competing notions of the Rule of Law which are unconcerned with the degree of abstraction of rules, and with the difference between their being negative or positive or with their conflict with pre-existing and socially necessary pre-existing values and obligations, are not notions of the Rule of Law which are compatible with the preservation of an abstract society. A vision of law composed of detailed, concrete rules governing conduct in a positive way and conflicting with the pre-existing obligations and minimal conditions for social interaction is at odds with the Hayekian conception of what law is, and the type of society it is geared to sustain. It is this definition of law — as one of any degree of concreteness — which Hayek attributes to the work of Kelsen,<sup>13</sup> and hence his insistence that Kelsenian positivism was paving the way for redistributive policies<sup>14</sup> by its very conception of law. I have, in this thesis, extended this critique to encompass more contemporary versions of positivism as well.

One of Hayek’s main concerns is that the mechanisms used to implement schemes of distributive justice may change the nature of the society in which they are implemented, in a way which is not desired, nor understood. Hayek is concerned about the type of society which can be sustained by different types of rules, and he argues that only rules of a sufficiently abstract nature can be used to sustain a *Gesellschaft*-type society, which in itself comprises a multitude of *Gemeinschaften*. The argument of earlier chapters was that individuals ought to be subject to the governance of abstract and predominantly negative rules (and the mechanisms which support them) because it is *only* in this way that individuals can (a) act autonomously and adjust to increasing complexity and (b) have their

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<sup>12</sup> In Hayek (1973,2).

<sup>13</sup> See Hayek (1960, 236-239).

<sup>14</sup> And not merely these policies. Hayek’s argument in *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960, 239) was that this vision of law paved the way for totalitarian forms of society. This is, to say the least, uncharitable, and perhaps should be restated as saying that nothing in this vision of law could *block* such a result. I would argue, in addition to this, that such a notion of law is only a necessary condition for such societal forms arising. What is also needed, and what should be stressed as being essential, are the notions of law as authority being manifested in the conduct of the individuals who work within the institutional framework of law. For a sustained, though in some ways flawed, argument of this type, see for example *Hitler’s Justice: The Courts of the Third Reich* (Müller 1991).

conflicts resolved in a potentially objective manner. Furthermore, the argument is that it is only by being oriented in this way that individuals can orient themselves in a complex (*Gesellschaft*-type) society. If one attempted to use mechanisms which implement order by using more concrete methods or which are based on relatively concrete goals, the complexity of a *Gesellschaft*-type society would be transformed, sometimes gradually and sometimes radically, into more concrete society.<sup>15</sup> Furthermore, in an environment of diversity and complexity, this change would imply that the authority structure of society is similarly transformed, from one based in part on relatively objective decision-making mechanisms to ones based primarily on arbitrary (i.e. individual-specific) human judgment. This transformation would occur because it is the fact that individuals orient themselves with abstract rules which sustains a complex form of society. Concreteness in rules of conduct, then, is in a sense incompatible with regularity in social conduct in a complex society. Concrete goals, goals which depend on context, circumstances and numerous other space-time specifics, are more variable than more abstract values, which have a larger space-time reference. Only if individuals follow rules which are applicable across a wide set of environments will their behaviour be regular.

Another of Hayek's primary concerns is that the attempt to implement notions of distributive justice will transform individuals' conceptions of what the law is. Consider the following. Under the Hayekian theory, legal mechanisms are a set of particular techniques which are used to subject individual conduct to the governance of abstract rules. In other words, the "purpose" ("function") of legal mechanisms is to regularize conduct. In a complex society, this function can be carried out only by resorting to rules which are (a) abstract (in the goals they implement and in their reference), (b) negative, and (c) relatively stable over time. These rules are, in turn, generated and supported by a system of mechanisms which filter out particularity and give rules of conduct their general qualities. It is the functioning of these mechanisms, combined with the way in which they operate to produce regular conduct (by filtering out particularity, and by being based on minimal conditions), that generates and sustains a "legal quality". If, however, concrete rules are introduced into law — and under some theories of law, this cannot be ruled out — law becomes a mechanism for implementing substantive measures. Law and authority become synonymous, and the argument that law is not merely authorization is ignored. Additionally,

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<sup>15</sup> This is the underlying message of Hayek's most (in)famous work, *The Road to Serfdom* (1944).



and most importantly, there is nothing that ensures that authorization will produce the regularity which is necessary to sustain a complex society.

#### 4. The limits of legal mechanisms and the different meanings of “objective”

All of this has implications for arguments concerning distributive justice. On the Hayekian view, it is important to realize that if legal mechanisms have, as one of their primary functions, the filtering out of particularity, then there are limits to what can be achieved using legal mechanisms. Legal mechanisms are geared toward supporting the minimal conditions of social interaction through rules of conduct which are abstract and predominantly negative. For a variety of reasons outlined in previous chapters, these rules will be widely shared between individuals. In this sense, then, these rules can form the basis of objective judgments. It is important to keep in mind that such objectivity is restricted in its scope, and that the striving for objective judgments under mechanisms which in a sense presuppose objectivity must be restricted to areas where such commonality exists. If this restriction is not respected — if law becomes synonymous with authorization, independent of the mechanisms which support this — the *value* of objectivity itself could fall into disrepute. How this could come about is the subject of the discussion that follows.

The Hayekian view is that objective judgments are possible over the minimal shared values and obligations which underlie social interaction. The argument is that legal mechanisms are adapted to supporting these obligations, which are governed by abstract and predominantly negative rules of conduct. “Objectivity”, then, refers to judgments which command wide support because the values and obligations that they support are widely held across society and manifested in performance (and non-performance).

Now, if law is viewed as a form of authorization, the nature of objectivity can come to be subtly, but crucially, different. Law viewed as a form of authorization does not consider the difference between negative, prohibitive, rules and positive rules of conduct to be of great importance. The reason, however, that this distinction is of some importance, is that in a complex society, objective rules are abstract and also predominantly negative. Striving for objective *positive* rules, on the other hand, becomes more difficult in situations of complexity.<sup>16</sup> Thus, the striving for objectivity in situations where positive rules are *not*

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<sup>16</sup> As pointed out by Hayek (1976, 38-56).



shared between individuals can lead to simply *ignoring* particularity, and to one dominant view imposing its “objective” classifications on others. What can occur, then, is a subtle shift in the meaning of “objective” in order to accommodate the desire for “objectivity”. The striving for an impartial spectator perspective implies that one tries to form judgments based on rules which would be held by an imaginary spectator viewing one’s situation. Objective judgment in this sense means judgment “based on rules of judgment which could, in principle, be shared in common across individuals”. If there are situations in which the achievement of this perspective is particularly difficult (if one’s knowledge were intrinsically related to being in a particular time-space location or relationship, for example, or if one searches for common positive rules when the only commonality was between negative ones), and one continued to desire an impartial spectator perspective, one might be forced to resort to allowing judgments to be made by an *actual* (not imaginary) observer. Objective judgment in this sense means “judgment which is external to and independent of the will of the parties to a judgment”. This sense of objective is similar to, but not the same as, that which emerges from an impartial spectator perspective, for an impartial spectator viewpoint is based upon rules of judgment which *could* be known by an imagined spectator, while the reason for resorting to an actual spectator is that such rules cannot be generated. Thus, a gap opens up between the two forms of objectivity based on the nature of the knowledge and information which is being used in the judgment. The impartial spectator’s objectivity is potentially shared in common across individuals; the shift to an actual observer’s objectivity might imply that this form of objectivity is not possible.

To put it another way, the striving for an impartial spectator position implies that some of its rules of judgment are independent of the will of the imagining party, for they would sometimes want to have knowledge and information included in a judgment which must be excluded from this perspective because it could not be known by an impartial spectator. As the impartial spectator chapter outlined, this striving can lead to the (relative) overlap of impartial spectator perspectives (depending, critically, upon the differences in knowledge and environments of the judging individuals), and hence to objectivity in judgment between the different individuals of a society. This form of objectivity differs from entrusting judgment to an *actual* observer in that its objectivity emerges (if it emerges at all) from the *striving* for a shared perspective. That is, this perspective is a *result* of the desire for objectivity as mediated through the mutual sympathy mechanism. However, there is no

similar restriction upon the judgments of an actual external observer, for their rules of judgment are not necessarily the result of such a search for objectivity. It *might* be the case that they are shared (if, for example, the external observer strives for an impartial spectator perspective, and such a perspective is potentially achievable), but this is not necessarily the case.

## 5. Objective justice and the mechanism argument

Hayek's worry, then, is that the attempt to implement concrete measures in environments in which such concrete commonality of value and obligation are not present can lead to the subtle transformation of the authority structure of society and law. Moreover, the argument has been that such an over-extension will lead to a subtle transformation of the meaning of "objective", with the notion of objectivity shifting from one based on commonly shared values and obligations to one based on authority. This impacts on the notion of law which exists in a society. If law is not based upon objective judgments but instead becomes merely a form of authority — if, then, objectivity and objective judgments have fallen into disrepute, for they are seen as representing no more than the authority of particular groups — substantivity which is not widely shared can be easily incorporated into law, for all that is required is authorization.<sup>17</sup> The transformation of society, of law, and of the notion of objectivity, occurs because of a desire to implement concrete goals where there is no objective basis to support them. The argument against certain notions of distributive justice is that they attempt to find objectivity and shared obligations where none exist. One of the reasons for this is that these notions of justice depend heavily on positive rules of obligation, and these are, in many cases, unable to pass through the filters which support such objective obligations because of their level of particularity.

## 6. The Hayekian view of law and objective justice

The Hayekian view argues that objective judgments — in the sense of being based on commonly shared values and obligations — are possible. Moreover, they are desirable. It important, however, to be clear on how and why this is the case. In a complex society,

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<sup>17</sup> A point emphasized in Hayek's discussion of the matter (Hayek 1976, 38-56).

objective judgments are possible *if* justice is restricted to the shared minimal values and obligations which manifest themselves as abstract and predominantly negative rules. It is desirable because only in this way can disputes between individuals be resolved in a way which the parties will accept as justified. Furthermore, only objective justice is based on judgments which are able to sustain a *Gesellschaft*-type societal structure.

Given this, the question asked by the Hayekian perspective is which mechanisms are best able to deliver objective judgments? In other words, if we want decisions that are amenable to *objective* judgments and justifications (i.e. based on commonly shared reasons), which mechanisms can systematically deliver this to the greatest possible degree? The principle argument made by this work (as a whole) is that the mechanisms which are capable of generating objective judgments must restrict the *type* of knowledge which enters decisions. Simply put, this knowledge must not be concrete.

What restrictions does this place on mechanisms capable of delivering objective judgments? As has been argued previously, the rules capable of guiding judgment must be abstract and predominantly negative. These properties are generated by judgments passing through the various filters which have been discussed in previous chapters.

Is it possible, then, that some set of conflicting goals exist, for which we desire an objective resolution, but which cannot be governed by an objective decision mechanism? The answer would be yes, and this is in fact an idea which underlies many of Hayek's objections to distributive justice. Hayek claims the nature of these notions would require mechanisms which, to achieve their goals, must produce judgments which are non-objective, and therefore they cannot be based on general rules capable of passing through either the impartial spectator or UCC filters.<sup>18</sup> This filter failure implies that such mechanisms cannot form the basis of an abstract, *Gesellschaft*-type, society. Hayek's objections to distributive justice, then, are based on the idea that the means chosen to implement this goal are incompatible with the structure of society and authority which many individuals hold as a value.

Note the obvious connection with the Hayekian conception of justice (i.e. justice being blind — justice being, in a word, abstract — and *necessarily* and *intentionally* so). In some

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<sup>18</sup> This is, I believe, the essential point underlying most of Hayek's objections to the notion of distributive justice in a complex society.

conceptions of justice, justice is not necessarily blind to particular detail.<sup>19</sup> In a Hayekian theory, on the other hand, it is a necessary feature. To quote Hayek: “the *possibility* of justice rests on [the] necessary limitation of our factual knowledge” (Hayek 1973, 13, my italics). An interesting question raised by these alternative visions of justice is, of course, whether or not they are epistemologically sound. Hayek’s argument, simply put, is that those espousing notions of distributive justice which would entail governance by concrete methods are unsound, for they presuppose the existence of objective knowledge which does not exist and which would exist only by changing the structure of social interactions and authority to a very large extent. Hayek’s argument, simply put, is that in a complex society this objective knowledge does not exist.<sup>20</sup> Moreover, the circumstances in which such knowledge would exist are quite different from the circumstances which underlie interaction in a complex society. Hayek’s claim, then, is that other theories of justice are erroneous because they base their theories on an unsound epistemic assumption. These foundational assumptions in a sense presuppose away the possibility of achieving objective justice by basing their notion of justice on knowledge which, given a particular form of social interaction, is *necessarily* arbitrary (individual-specific, i.e. not shared in common).

The Hayekian critique of certain notions of distributive justice rests upon this argument. *If* one desires decisions to satisfy an impartiality/objectivity criterion, then certain classes of information (knowledge) must be excluded as proper grounds for a judgment — and this knowledge is individual-specific, concrete knowledge.<sup>21</sup> The reason for this is that a demand for the consideration of increasing amounts of particular detail, which in a complex society would be increasingly person-specific, cannot be accommodated in an objective way within an authority structure capable of sustaining an abstract society.<sup>22</sup> But why would this be so? Surely Hayek is not claiming that people should not consider particular details? Of course they must. But in an abstract society, the *selection* of which particulars to be considered must fall under shared abstract and predominantly negative rules of conduct if judgments are to be objective. What Hayek is saying, then, is that not *all* of the particular

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<sup>19</sup> In Rawls’ theory of justice (1971), for instance, there is a tension between his original position argument (which is, essentially, an attempt at abstracting out the common principles binding a society) and the particularity requirements of his “difference principle” (which would, depending on its level of generality, require an explicit classification *and* rank-order over the various forms of being “worse-off”).

<sup>20</sup> Hayek refers to the belief that such knowledge exists, and is known to one mind, as the “synoptic delusion” (Hayek 1973, 14).

<sup>21</sup> That they have not fulfilled this criteria to this day does not imply that it is not a desired (or desirable) ideal or that attempts to improve legal systems should not move in this direction.

<sup>22</sup> See Hayek (1952, 163).

circumstances which are present in a particular case can be used to arrive at objective judgments in a particular case, and that not all of the detail known by a particular mind *should* be used to decide the outcome of judgments about a particular case if objectivity is desired. The argument is, then, that only by using judgments based upon abstract and widely held principles is there the *possibility* of *objective* decision making.

## 7. A consideration of alternative governance mechanisms

The Hayekian position is that the basis of the restriction on the types of knowledge entering decision-making flows from an increase in the complexity of social life and a consequent move away from judgments based on particulars and a move towards those based on more abstract considerations. As knowledge as a “totality” increases — as the *division of knowledge*<sup>23</sup> continually grows — the relative ignorance of particular individuals also increases relative to this “totality”. For aspects to be shared between individuals, they must be abstracted from the wealth of particulars found in this complexity. The argument is, then, that social decision-makers must shift their considerations to more abstract aspects in order to be able to judge the increased amounts of particularity which accompany an increase in complexity.

This is not, however, the *only* way to deal with the difficulties engendered by complexity. Another approach would be to resort to *other* mechanisms having different governance properties from the decision-making mechanisms considered to this point. Thus far, the focus has been on legal mechanisms. What has not been stressed is that these mechanisms exist alongside a variety of others, and that these other mechanisms have different properties from legal ones. Consider the contrast between legal and political mechanisms. Legal mechanisms are geared to supporting the minimal conditions for social interaction through abstract and predominantly negative rules of conduct. Legal mechanisms, in other words, are aimed at supporting decentralized conduct governance by abstract and predominantly negative rules. Political mechanisms, on the other hand, are geared towards collective choice which in many, though certainly not all, cases are focused upon positive rules of conduct. In other words, my view is that when compared with legal mechanisms, political mechanisms are geared towards measuring and implementing

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<sup>23</sup> A useful concept first mentioned by Hayek in his 1937 paper, “Economics and Knowledge” (Hayek 1948, 33-56).



measures with a greater degree of concreteness. This should not be taken to argue, however, that political mechanisms *cannot* generate more abstract rules of conduct, for they are certainly capable of doing this. The argument is, rather, that political mechanisms are better adapted to registering concreteness than are legal mechanisms, and that legal mechanisms are better adapted to supporting predominantly negative abstract rules of conduct.

The reasons for this are, in part, based on the different closure properties that each mechanism is well-adapted to governing. Consider situations of conflict. Some mechanisms are based on *all-or-nothing* choices, in part based on the *need* to *resolve* an issue in an authoritative fashion. Now, in social situations where individuals' classifications are such that one side of a conflict has a relatively strong override on the other, this might not be too problematic. In this case, there is agreement on the relative strength of one side and the relative weakness of another. Many of the minimal values and obligations which underlie social life are probably of this form, and it has been an argument of earlier chapters that legal mechanisms are well-adapted to supporting these insofar as they are abstract and predominantly negative. If these obligations were positive, however, there would typically be the need for a resort to additional mechanisms which would be capable of supplying the concreteness which positive obligations entail. Whether such obligations were fulfilled through group-oriented decisions or in some more decentralized manner would depend, of course, on the desired course of action and the performative complexity and consequences it entails.

Problems arise when the conflict is not based on a social consensus concerning the strength of different sides of a conflict. In these cases, all-or-nothing governance mechanisms can produce results which *impose* the overriding concern of one group onto the overriding concern of another. For this reason, *both* legal and political mechanisms which attempt to deliver objective judgments encounter difficulties when confronted with issues where there is not a relative consensus on which rule to allow to dominate and which rule to allow to be dominated. In fact, in such situations, it becomes difficult to talk of the "objective" nature of a decision at all. What this might imply is that mechanisms which are well-adapted to delivering judgments in environments in which there is an all-or-nothing "consensus" (be it conscious, or merely performative) will be mal-adapted to delivering such judgments in environments in which this is not the case, and in which numerous trade-offs have to be made.

Return for the moment to an issue raised above — that political mechanisms differ from legal mechanisms in that they are in large part concerned with collective choice which in many cases is focused upon *positive* rules and the performance of particular actions. These positive rules can be divided into two types: those that implement minimal necessary conditions, and those that build on necessary conditions in an attempt to improve upon them. Political mechanisms are well-suited to the first type of situation, for while there will be relatively widespread agreement on *what* these minimal conditions are, the views over *how* they are to be fulfilled are likely to be less so. What is required in such a situation are mechanisms which allow for *trade-offs* between competing implementation mechanisms, and which allow for concretizations of actions to be implemented. Such trade-offs will occur over time, with some giving up their preferred concrete choice for the abstract assurance that over time, others will give up their goals for them.

Now, to avoid misunderstandings it is important to emphasize a couple of points concerning political mechanisms. First, the closure properties of the scenario outlined above imply that some will be forced to give up their particular choices so that the choices of others might be achieved. That such a trade-off is *necessary* is the result of referring choice to a mechanism which has the property of mutually exclusive choices. This implies that for issues in which there is agreement, this property will be of lesser importance than in situations in which there are numerous views of what should be done. The upshot of this is that political mechanisms will force trade-offs less if they are merely implementing positive rules based on widely shared views of minimal conditions. If they are used to resolve conflicts in which there are a variety of different views — none of which has majority support — these mechanisms will override individual choice to a greater and greater extent.

Second, legal and political mechanisms do *not* differ substantially in the way in which they operate in situations of complexity. It is sometimes claimed that politics is about open dialogue, while law is about closure and authority. This view is, I think, mistaken, for it is based upon an equivocation concerning the level of complexity of the environment within which each type of mechanism operates. If political mechanisms are put into situations of social complexity, they must overcome problems which are similar to those faced by legal mechanisms. In particular, the problem of communicative complexity assumes an increased importance, and the various solutions to this problem are all geared towards closing down channels of communication, filtering out the “extraneous” bits, and standardizing the

discourse that is allowed to impact on decisions. This is achieved through the resort to a variety of mechanisms which operate in environments of complexity by abstracting out those aspects which are considered to be “relevant” and hence reducing the channels of communication.<sup>24</sup> Thus, both legal and political mechanisms, when considered within environments of similar complexity, invoke closure and narrow down the channels of communication. Moreover, both legal and political mechanisms make a claim to be governing wide spheres of conduct and to being authoritative, and hence both can override the choices of particular individuals, both in their not being able to avoid being governed by these mechanisms, and in their being able to follow their own choice of conduct.

I might mention at this point one other mechanism which Hayek tends to emphasize: the market mechanism.<sup>25</sup> The Hayekian view is that the market mechanism is a conduct governance mechanism which has its own specific governance properties. Like other governance mechanisms operating in environments of complexity, it provides an interaction structure whereby conflicts are resolved using a minimal information criterion (numbers, say, in the case of a very abstracted notion of a market). A market mechanism is on this view a governance structure for interactions with rather minimal informational requirements demanded of the agents to the interaction.<sup>26</sup> The foundation of Hayek’s belief in the necessity of resorting to market mechanisms is the belief that markets are effective in situations where commonality is lacking and where all-or-nothing collective judgments would result in one side imposing its rank-ordering on another. By decentralizing judgments, the “collective” judgment in effect embeds aspects of matter-of-degree judgments, and hence it can allow for conflicts which an all-or-nothing closure technique attempts to preclude.

Markets are mechanisms adapted to governance in environments where knowledge is fragmented, and where complexity has produced a diversity of concrete goals for different individuals. As knowledge becomes specialized and the division of knowledge grows more and more complex, the “totality” of knowledge increases. This “totality”, however, is known to no one mind,<sup>27</sup> nor to any one group, and in principle it cannot be known by any one

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<sup>24</sup> For an overview of some of these mechanisms from a “public choice” economics perspective, see Mueller (1989).

<sup>25</sup> For a fascinating historical overview of market phenomena, and their contextual development alongside the growth of European society, see Braudel (1981; 1985; 1985a).

<sup>26</sup> A point emphasized repeatedly by Hayek (1948, 33-56, 77-91; 1978, 179-190; 1979, 65-77).

<sup>27</sup> See Hayek’s discussion of the belief to the contrary, under what he terms as the “synoptic delusion” (Hayek 1973, 14).

mind or group. Thus, as the “totality” of knowledge increases in size, there is a corresponding decrease in the ability of any one particular mind to contain this knowledge. A particular mind can only contain this knowledge at a relatively high level of abstraction. This limitation is a result of the constitution of mind, the idea being that there is an “economy of mind”, i.e. that mind is limited in the amount of actions which it can contain. Thus, in complex societies there will be a large increase in the instances of particular knowledge which, in turn, can only be known at a relatively high level of abstraction.<sup>28</sup> The question this is, if one wants to use particular knowledge, how does one do this? Consider the following dilemma: one wants to use particular knowledge, but one’s mind contains only very general rules governing that knowledge. Hence, one must depend on the particular knowledge of another. Particular knowledge must be governed by general rules, yet the general rules are not capable of resolving particular issues. The Hayekian claim is that what is needed is a mechanism whereby the particular knowledge of another is imparted to another — becomes knowable, at a different level of abstraction — in a way in which one is not forced to rely on the arbitrary (person-specific) aspects of another’s judgment.<sup>29</sup> What is needed, in Hayek’s view, is a *market* governed by general legal mechanisms. Under this combination of mechanisms, one can find interactions governed by abstract rules geared to the relatively decentralized interaction of self-guided individuals.<sup>30</sup>

## 8. Negative rules and objective judgments

The consideration of different types of conduct governance mechanisms and their relationship to negative and positive rules reintroduces an important element into the

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<sup>28</sup> A point stressed by Hayek in *Law, Legislation and Liberty* (1976, 11-12).

<sup>29</sup> This is not to argue that conduct governance by market mechanisms *ensures* that coercion does not take place, for such mechanisms assume that the minimal conditions for action and social life — both negative and positive — have been satisfied. This condition, which might not be met in specific cases, is one which provides an argument for (at the least) minimal levels of distributive justice (especially given the complexity of satisfying positive minimal conditions in complex societies). Nor is it to claim that the existence of a market form of governance is a necessary condition for “individual freedom”, as has been argued by Milton Friedman (1962; 1980), unless by this one implicitly assumes both that legal mechanisms, and the governance by abstract rules that they support, are necessarily tied to market mechanisms, and that the environment of interest when referring to “individual freedom” is that of a complex society.

<sup>30</sup> This is not to say that all interaction under market mechanisms is decentralized, but only that relatively speaking, it is decentralized compared to other mechanisms of more collective choice which encompass *entire* polities. There is, perhaps, an argument to be made for the decentralization of many of these more encompassing mechanisms, if what they hope to accomplish *can* be accomplished more effectively under a variety of (potentially more diverse) decentralized mechanisms.



discussion. The previous chapters have emphasized the importance of understanding the foundations of regularities of conduct at the individual level. The focus of these chapters has been upon the mechanisms which generate and support such regularity, with a stress placed upon three distinctions of some significance: the distinction between abstract and concrete rules of conduct, negative and positive rules of conduct, and necessary and sufficient conditions associated with rules of conduct. The argument of earlier chapters was that legal mechanisms are adapted to supporting abstract and predominantly negative rules of conduct which in part constitute the minimal necessary conditions of social life.

Now, given that up to this point in the thesis an emphasis has been put upon minimal conditions which can be satisfied by conforming to negative rules of conduct (i.e. by refraining from certain forms of conduct), one might have formed the impression that the argument is that all the minimal conditions for social interaction can be satisfied *solely* by abstaining from performing certain acts. This would, however, be a false impression. While some minimal conditions for social interaction can be satisfied by conforming to negative rules of conduct — and hence are amenable to governance by legal mechanisms — not all minimal conditions can be satisfied using these mechanisms. In particular, minimal conditions which demand the performance of certain types of conduct must in some cases resort to positive rules.

It is important to keep in mind that the minimal obligations which underlie social interaction are both negative and positive. This thesis has focused on negative obligations because of their intimate connection with legal mechanisms. This should not be taken to imply that positive minimal obligations are not important. These obligations are as significant as negative ones, and it is one of the weaknesses of Hayek's legal theorizing that positive obligations are granted little attention. From the point of view of this thesis, to ignore positive obligations is a mistake, not merely because such obligations are of fundamental concern, but also because such obligations often presuppose different mechanisms for their fulfilment. As argued previously, negative rules refer to actions that do not occur, while positive rules refer to actions that do occur. An important aspect of the difference between the two rule types is the differing degree of abstraction of the actions which can satisfy these rules. Negative rules of conduct are satisfied by the ongoing lack of performance of certain acts. Positive rules of conduct, on the other hand, oblige one to perform acts which exist at particular points in space and time (i.e. a specific number of



performances, or a particular location for each performance, etc.). In this sense, then, negative rules of conduct are satisfied by conditions which are more abstract than are the ones satisfying positive rules of conduct, i.e. negative rules of conduct refer to larger chunks of space and time.

This leads to two important insights. First, positive rules are satisfied by conditions which are more concrete than those which satisfy negative rules. The importance of this point is related to a second insight which assumes a greater significance when one takes into account the governance properties of rules of conduct in increasingly complex environments. This is the point that negative rules of conduct are more effective adaptations to increases in complexity than are positive ones. Why would this be the case?

Negative rules are generated and supported by the mechanisms described in earlier chapters. These mechanisms deal with complexity by stripping away increasing levels of particularity. The result of this process are rules of conduct which are abstract and in many cases negative in the sense of prohibiting certain conduct. The increasing prominence of the negativity of these rules is directly related to increases in complexity, for their negativity is related to their abstractness. The more complex the environment one encounters, the more effective negative rules of conduct become as guides to conduct.

All of this is related to the different *ways* that negative and positive rules govern individual conduct. Positive rules of conduct specify acts which are to be performed. Thus, positive rules of conduct exclude other conduct by eating up the time that is available to perform any conduct at all. Negative rules of conduct, on the other hand, specify acts which are not to be performed. Negative rules exclude conduct by specifically prohibiting its performance, and as this prohibition does not take time to perform, one is not excluded from performing other acts which one might desire. Now, this difference in the way that each type of rule governs conduct becomes of heightened importance when one considers the conjunction of (a) the systemic properties of rules and (b) situations of increasing complexity. Consider the systemic nature of rules. Systems of negative rules govern conduct by prohibiting certain forms of conduct. The cumulative effect of adding more and more prohibitions to a system of negative rules of conduct is to exclude more and more of the available alternative paths of action which one can perform without violating a negative rule. Note that such a cumulation does *not* consume the time of the individual, and hence, though their paths of action are restricted, they are not restricted on the *time* that they can

devote to their chosen plans of action. Systems of positive rules do not have this property. Adding more and more positive rules of conduct to a system of positive rules results in individuals having less and less time to devote to their own plans of action, with more and more time being devoted to the acts which positive rules specify to be performed.

Now consider the relationship to complexity. In relatively simple environments, with few alternative paths of action being available to individuals, the difference between the governance properties of rules might not seem too significant. But in situations of increasing complexity, where the number of alternative plans of actions increases significantly, the governance properties of each type of rule become more significant. Negative rules specify acts which are not to be performed, and this prohibition does not impact on the time that one can devote to alternative paths of action. Positive rules, on the other hand, do specify the acts to be performed, and this specification does impact on the time that one can devote to alternatives. In other words, then, positive rules become increasingly restrictive as complexity increases.

Now, one might argue that either type of rule of conduct is capable of restricting action if they are defined in a suitably vague manner. If rules are defined in this way, and if individuals who desire to follow these rules are forced to refer to others to fill in the content of these rules, then either type of rule can restrict conduct simply by having whatever one does (or does not do) subject to authorization by another. While this is correct, and points to an argument that rules should be defined as clearly as possible so that this authority reference is minimized, it does not take into account the important relationship between undesirable states of affairs and negative, prohibitive, rules of conduct. In earlier chapters, an argument was made that for evolutionary reasons, knowledge of harm and undesirable states of affairs is more commonly-shared among individuals than is knowledge of pleasure and desired states of affairs. When this is connected to the argument that negative, prohibitive, rules are often easier for single individuals to follow (in that they do not presuppose “transfers” of actions *between* individuals, and hence do not require mechanisms which can coordinate such “transfers”), one can make the argument that between negative rules and positive rules, negative rules will be easier for individuals to follow under their own judgment.

This leads to the implication that as complexity increases, systems of positive rules will feel the increasing need to resort to mechanisms capable of registering concreteness. The

reason for this is that the mechanisms of abstraction described in previous chapters deal with complexity by stripping away increasing degrees of particularity. But with positive rules, this is precisely the opposite of what is required. As complexity increases, positive rules which impose obligations to act and to transfer actions must become increasingly detailed in their specification of when the positive rule is to be satisfied if individuals are to be able to follow them under their own judgment. My view of this problem is that in large part it is the role of political mechanisms to supply this concreteness. Political mechanisms have developed in large part to register concrete decisions (i.e. to register decisions of the moment applying to concrete circumstances). This concreteness, which is required by implementations of minimal conditions which require the *performance* of conduct, can be supplied by political mechanisms in a relatively objective manner provided that there exists a foundation of commonality upon which such mechanisms are based. Of course, in environments of complexity, as the degree of concreteness of the implementation increases, such commonality will gradually decrease and so enters the possibility of arbitrary, non-objective governance. This potentiality for non-objective governance should be restricted by abstract rules of conduct (such as those supported by legal mechanisms) in order for these rules to continue to govern conduct in a general way, but in some sense such arbitrariness will be an unavoidable consequence of resorting to mechanisms which require a greater degree of concreteness than can be supported objectively in a complex society.

There are two, often complementary, solutions to the problem posed by the concreteness requirements of positive rules to which one might resort if autonomous conduct guidance remains a priority. First, minimal positive obligations can resort to abstract mechanisms to mitigate this difficulty. In other words, both the positive obligations and the governance mechanisms which implement them might become increasingly abstract to accommodate increases in complexity. Thus, the resort to market mechanisms and general instruments of taxation (rather than the resort to more concrete methods) represents one solution to this general problem. Second, another approach would be to specify the state of affairs which are desired, specify negative rules over these states of affairs, but leave the precise manner in which they are to be achieved to more decentralized conduct. In this way, the choice of paths of conduct would be decentralized, and yet a positive obligation would be imposed without the specific choice of conduct being dictated to the individual.

It should be stressed that neither of these “solutions” actually address a fundamental problem: how is it to be decided which activities are to be the subject of positive obligations? The discussion of this most important question shall be deferred until the final section of this chapter.

## 9. The attribution of justice to “states of affairs”

Thus far the chapter has shied away from a detailed examination of the consequences which would follow if one adopted the theoretical framework set out in this thesis. It has also avoided confronting the substantial literature on Hayek’s critiques of the concept of distributive justice.<sup>31</sup> The sections which follow will try to address these issues by focusing on two of Hayek’s critics who put forward arguments of particular clarity and which are representative of the types of objections most often directed against Hayek’s critiques. These sections, then, will attempt to illustrate the implications of a Hayekian view of distributive justice by focusing on a useful summary of Hayek’s perspective found in A.M. Macleod’s article, “Justice and the Market” (1983), and by examining some objections made by Neil MacCormick in his article “Spontaneous Order and the Rule of Law — Some Problems” (1989). These articles can be used to illustrate the major points of concern of those who criticize the views spelled out in this chapter, and to provide a focal point around which the implications of these views may be explained and scrutinized. My goal, however, is not so much to criticize the particular author of these objections to the Hayekian view (many other writers have echoed these complaints) so much as to investigate the degree to which these *types* of criticisms are worthy of attention. My strategy, then, is to state these criticisms, spell out *their* implications, and point out the implicit presuppositions which on first glance give these criticisms their apparent force.

Turn, then, to Macleod’s summary of the issues concerning Hayek’s views on distributive justice. Macleod admirably distils the major issues into three questions concerning Hayek’s notion of justice. He asks

...whether the judgments about the justice of states of affairs...can be derived from judgments about the justice of the actions which brought about these states of affairs...

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<sup>31</sup> The literature dealing with Hayek’s critique of social justice is substantial. See, for example, the references given in Gray (1986) and Kukathas (1989) to discussions of this topic.



...whether judgments about the justice of states of affairs incorporate or entail responsibility-imputing judgments...[and]  
 ...whether Hayek's own criterion — according to which states of affairs must be intended or foreseen upshots of actions if justice or injustice is to be predicated of them intelligibly — serves to effect the exclusion, as meaningless, of judgments about the justice or injustice of the distribution typically effected by market forces in what Hayek calls a 'free' society. (Macleod 1983, 556)

I shall use these questions as a framework around which Hayek's theory may be explained. Turn to the first question. Issues of distributive justice typically turn around the question of whether it is just (or unjust) that "A should have much and B little" (Hayek 1976, 33). Macleod argues that under Hayek's own criterion for justice-attributions, i.e. that such a state of affairs is "the intended or foreseen result of somebody's action" (Hayek 1976, 33), this can be an issue of justice. Furthermore, the issue of justice turns on the existence of the state of affairs, and only incidentally on how it arose. As Macleod puts it,

If we examine judgments about an existing state of affairs — the judgment, say, that the existing situation is unjust in some way — we find our attention focusing on the features of the situation which make it urgent for the situation to be changed and not (except incidentally) on the question of how it came about, let alone on the question [of] who (if anyone) is morally to blame for its having come about. (Macleod 1983, 558-559)

Is this correct? There are a couple of arguments doing the work here, and focusing on them allows one to see what exactly is at stake in this discussion. First, then, consider the argument that judgments of *how* a state of affairs comes about is more fundamental than the judgment of the justice of the existence of the state of affairs. Is this a sensible argument? Perhaps it is, but such an argument must be qualified. Is the definition of states of affairs important to the attribution of justice? Of course it is. Can attributions of justice or injustice apply to the results of conduct? Of course they can. "Do not kill" or "Do not act in such a way that death to another results" are not appreciably different rules *if* the resultant state of affairs can be defined in advance. The important point is that the performance or non-performance of conduct is a *necessary* condition for an attribution of justice or injustice. It is not a sufficient condition.

Note a second point brought out by this example. The way in which certain states of affairs comes about *does* seem to be of decisive importance when making an attribution of justice or injustice. Consider the state of affair of being dead. Is it this state of being to which one attributes justice or injustice, or is it the manner by which one came to be dead



that is of decisive importance? I would argue it is the latter — deaths resulting from certain forms of conduct, but not others, are unjust. Or consider the state of affairs of being harmed. Is it the state of being harmed that is unjust, or is it the way that you were harmed which can be just or unjust? Again, I would argue that it is the manner in which you were harmed which is of decisive importance. Discussions which focus on the attribution of justice or injustice to states of affairs and ignore the conduct which produce these states leave out some of the most important instances of justice-attribution in society — those instances of injustice which are governed by legal mechanisms. Are these mechanisms “uninterested” in how certain states of affairs came about or in who is responsible for a state of affairs coming into existence? I think not. Focusing on the justice or injustice of states of affairs independent of how they came to exist lacks even a rudimentary insight into the nature of legal judgments which govern some of the most important instances of injustice in society. If one fails to take into account this already existing mechanism for determining the justice or injustice of conduct, one completely misunderstands the backdrop against which attributions of justice or injustice to states of affairs take place.<sup>32</sup>

What, then, can one make of Macleod’s argument that when examining judgments of states of affairs the focus is generally on the justice or injustice of aspects of the state of affairs and not generally upon how, or by whom, they were produced? Is this correct? It does seem to be for certain cases. Consider the state of having little while others have much. Is it the state of being which is unjust or is it *how* you came to be in this state which is of decisive importance? In this case, it seems that justice is being attributed to the state of being, and not to the manner by which one came to be in this state. This seems different, then, from the previous cases. How might this be explained?

The essential difference is that the first two situations are considering the violations of *negative* rules of conduct, while the third situation is considering the violation of *positive* rules of conduct. In other words, in the first two situations, individuals did things they should not have, while in the third situation, it is the lack of action by others which is objectionable (for their lack of action leaves others in a state of lacking relative to others, or of lacking a “just” amount). Macleod’s discussion relates, then, to prescribed acts (based on

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<sup>32</sup> This would apply with equal force to the claim made by Sadurski (1985, 22-23) that there is “no manifest reason why justice should be applicable primarily to human conduct and can only apply derivatively to states of affairs”.

governance by positive rules) and not to prohibited acts (based on governance by negative rules).<sup>33</sup> Is this distinction significant?

As I have argued in previous chapters, it is of decisive importance for a variety of reasons. Negative rules govern conduct in a different way from positive rules. It is for this reason that the mechanisms governing justice in a *Gesellschaft*-type society are based primarily on negative abstract rules of conduct. Furthermore, there are differences in the notion of “freedom” depending upon which type of governance mechanism is presumed to govern conduct. Being governed by the same negative rules as everybody else does not presuppose that concrete obligations are owed to anybody. Instead, abstract obligations not to perform certain acts exist for everyone. In this sense, then, all individuals can be “free” in the same way. Positive rules which demand conduct, on the other hand, can manifest concrete obligations between individuals and might imply that some individuals are obliged to others. This can lead to some being “free” from certain situations only because others are “unfree” in the sense that they must aid individuals in these situations. This is, then, a non-universalizable definition of freedom.

Thus, a fundamental objection to the argument that there is no need to examine how states of affairs come to exist is that it ignores the mechanism under which such results are generated. Hayek’s claim is that arguments of mechanism *are* of decisive importance, the claim being that in an abstract, *Gesellschaft*-type society social interactions and hence social states of affairs are governed by individuals ordering *their own* conduct. Hence, if one ignores the way that undesirable states of affairs arise one would be ignoring the fact that there is already a pre-existing order to individuals’ conduct which might be disrupted by the introduction of various other “solutions” to the problem — in particular, those “solutions” based on positive rules of conduct.

The argument that judgments concerning existing states of affairs tend to focus on the justice of aspects of these states and not on the conduct which produced these states is thus flawed for two reasons. First, such an argument ignores the fact that legal mechanisms are very concerned with *how* certain states of affairs came to exist and with identifying *who* produced them. Second, this argument ignores the essential distinction between states of

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<sup>33</sup> The same holds for Sadurski’s discussion (1985, 24-25), and as is argued in the discussion of the main text that follows, this oversight undermines both his, and Macleod’s, argument in exactly the same way.

affairs which were produced by violations of negative rules and those which were produced by violations of positive rules.

This lack of concern over the form of conduct governance mechanisms is apparent when one turns to Macleod's second point, "whether judgments about the justice of states of affairs incorporate or entail responsibility-imputing judgments" (Macleod 1983, 556). In a *Gesellschaft*-type society governed by abstract negative rules of conduct, this is indeed the case. How, then, can Macleod assert that "[i]f an envisaged state of affairs is deemed to be unjust, the question of responsibility ascription does not — indeed logically cannot — so much as arise" (Macleod 1983, 558)? How does this relate to an envisaged state of affairs where someone has been killed in a brutal manner? Is not the question of responsibility ascription and indeed the question of whether or not being dead is a matter of justice dependent upon the ascription of responsibility to someone or some group that acted unjustly? Indeed it is. And it is the manner by which one becomes dead that is decisive in deciding whether or not judgments of justice are applicable or not. But how, then, can one make sense of Macleod's assertion?

The only conclusion that can be reached is that Macleod completely overlooks the relationship between justice-attributions, responsibility imputations and the concept of justice which governs an abstract society. The reason for delimiting justice to situations where responsibility can be ascribed is the recognition that only such cases are amenable to the governance of conduct by abstract negative rules. Such governance is essential to the preservation of an abstract, *Gesellschaft*-type society. It is the failure to recognize the implications of not specifying the type of governance mechanism which underlies the notion of justice which allows for a consequent mechanism vacuum to arise. This vacuum is in turn liable to be filled by methods which are incompatible with *Gesellschaft*-type social relations, and which allow for the substantive ends of some to be imposed over top of, and in conflict with, the substantive ends of others. It is precisely this form of imposition which the mechanisms of justice supporting a *Gesellschaft*-type society attempt to filter out. Thus, the separation of attributions of the justice of states of affairs from judgments of responsibility can lead to incompatibilities with the very notion of justice which underlies an abstract society. The attempt to separate judgments of the justice of states of affairs from responsibility-attributions is based upon a blindness to the intimate connection between justice-attributions and individual responsibility which forms the basis for the concept of

justice which is *capable* of supporting an abstract, *Gesellschaft*-type society. Undermining this connection, then, undermines the very notion of justice upon which an abstract society is predicated.

#### 10. The connection between justice and responsibility-attributions

This is related to Macleod's third point of "whether Hayek's own criterion — according to which states of affairs must be intended or foreseen upshots of actions if justice or injustice is to be predicated of them intelligibly — serves to effect the exclusion, as meaningless, of judgments about the justice or injustice of the distribution typically effected by market forces in what Hayek calls a 'free' society" (Macleod 1983, 556). The argument is, basically, that the decision by a government to continue with a "free" society and the consequent inequality which results is the "foreseen consequence of the decision to maintain a 'free' society" and hence is amenable to justice-attributions under the criteria argued for above. Consider an even stronger argument, made by Neil MacCormick. Assume that a government had superimposed an organizational order upon a spontaneous order (MacCormick 1989, 48). They then attempt to "roll back" these changes. MacCormick argues that

[t]o the extent that restoration of a spontaneously self-regulating market order is in these circumstances an object of deliberate endeavour, it seems obvious that the outcomes of the working of the market must now cease to fall beyond the realms of justice. Those who seek to restore the market know that properly working markets generate considerable ranges of economic inequality. No such inequalities are, nor need be, intended by any of the market's participants. But those who deliberately set about restoring a market-based economic order must be deemed to intend just such inequalities, for such a person is deemed to intend what he knows to be the foreseeable outcome of his act. That one cannot foresee *who* will make the gains and suffer the losses is irrelevant to the issue of responsibility. If I give a hand-grenade to a madman en route to the theatre and people get killed, I cannot afterwards excuse myself by saying that I couldn't foresee who would be killed. (MacCormick 1989, 48)

What is one to make of this argument? Is the analogy between the madman scenario and the rolling back of a regime based on distributive justice an apt one to make? Perhaps not. One difference between the two scenarios is the difference in the *causal connection* between actors' conduct and the consequences which flow from this conduct. This difference in causal connectivities between the two situations is instructive. In the madman situation there is a relatively direct connection between the conduct of the madman and the harm which



results. The connection between the individual who gives a hand-grenade and the harm which results is more distant still. What, then, *limits* the responsibility of the hand-grenade donor? One could come up with a number of principles. For instance, one might argue that for the donor to be in part responsible for the harm created by the madman, they must have been aware of the madman's state of mind (unless one wishes to argue that *any* handing out of hand-grenades is wrong, but then that would be a different argument). Otherwise, how does one individual become responsible for the harms inflicted by another? By providing *some* of the necessary conditions for the infliction of this harm? But then surely *all* those who contributed to the necessary conditions for the harm taking place would bear responsibility for the harm caused. Similarly, one could argue that the duration of time which passed between the giving of the hand-grenade and the madman's harm is of some importance. If, say, twenty years had passed, might this not contribute to a diminishment of the responsibility of the donor? Finally, one might be curious to know whether the madman met anyone along the way who noted that he had a hand-grenade. Perhaps he handed it to someone while he tied his shoelaces, or walked in clear view of an on-duty police officer who was not sufficiently attentive, or maybe he went home for supper with his mother who noticed that he had a hand-grenade. Do these intervening interactions in any way lessen the responsibility of the giver of the hand-grenade?

Turn now to MacCormick's argument concerning the imputation of responsibility when a government attempts to roll back programmes of distributive justice and generate a market-based economic order. There are two possibilities which might be considered: acts and omissions. I will consider the latter possibility first. Turn then to a situation where a government refuses to address issues of distributive inequality. Is the causal connection between this and the madman scenario supposed to be of the same type? Is there supposed to be as direct a causal connection between the decision not to pursue distributive justice and the results which accrue to particular individuals? Is the government's inaction, which allows individuals to act in the manner they see fit (so long as they do not violate the general negative rules which govern social interaction), supposed to *transfer* responsibility from these acting individuals to the government? Or is government simply presupposed to assume responsibility for individuals' particular situations? What exactly is going on here?

It would seem that there are at least two different responsibility-attribution systems to which one could resort. One would be the system based upon the mechanisms described in



this thesis. These would probably be the ones to which MacCormick is implicitly referring in the madman example. Consider their use in that example. For responsibility to fall upon the hand-grenade donor, a variety of criteria must first be satisfied. Was the donor aware that the recipient was in fact a madman? Would it be wrong in any case to hand out hand-grenades (one would hope so!)? How much time passed between the handing over of the grenade and the harm inflicted? Was there any intervening conduct which might negative a responsibility-ascription? And so on. One could make the argument for a variety of criteria which would have to be met to establish the *degree* of responsibility the donor would have in this situation. The point of this is that responsibility-attributions are based on different rules which set out the degrees of responsibility that individuals will have for certain types of actions. But what, then, is the *purpose* of such rules?

The purpose (or function) of these rules is to set out the limitations on responsibility-attributions. Legal mechanisms, and their more institutionalized forms, also embed such concepts. The notion of certainty,<sup>34</sup> concepts such as intention (as manifested in *mens rea*, and differing degrees of intentionality) and the idea of an *actus reus* are responsibility-attribution and limitation principles. So too are the various doctrines of foreseeability and the various rules governing the proximity or remoteness of harm.<sup>35</sup> All of these are distinctions which attribute and limit responsibility. And all of these are tools for implementing a regime of conduct governance using abstract rules. One should not be fooled into thinking that these concepts can be defined in any way we please and still continue to serve this same function. The important point for our discussion is that there exists a relationship between the *content* of these distinctions and the type of society which this content is capable of supporting. *If* individuals are to be guided by *their own* judgment using abstract negative rules, their spheres of responsibility must be delimited by rules of responsibility-attribution which make this a possibility. Thus, if rules of responsibility are extended to include circumstances which are not known by individuals and could not be known without forcing individuals to substantially deviate from their own goals and values (either by following those goals which are embedded in the various responsibilities

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<sup>34</sup> In all of its manifestations, including certainty beyond a reasonable doubt and certainty on the balancing of probabilities. For a general discussion of the concept of certainty, see *Cross on Evidence* (Cross and Tapper 1990, 145-159).

<sup>35</sup> "The basic problem in negligence litigation is...that of limitation of liability, and no less than four 'control' or 'hedging' devices are employed with this single purpose in view: 'duty of care', 'remoteness of damage', 'contributory negligence' and 'voluntary assumption of risk' (Fleming 1977, 104).

manifested by these rules, or by being forced to refer to others as to what their responsibilities in fact are), they are not capable of governing individual conduct in an abstract, *Gesellschaft*-type society. It is, then, the *content* of these rules which are of decisive importance for determining the form of society they are capable of supporting. Suitably restricted, these rules play an essential role in limiting individuals' and groups' spheres of responsibility and are therefore fundamental to the conduct governance mechanisms which govern an abstract society. If they are not so restricted, they would instead form the basis of a much more concrete type of order.

Now, what has all of this to do with MacCormick's discussion of whether a government which rolls back programmes of distributive justice is responsible for the consequences of this action and hence can be judged under the rules of justice? The answer to this is that this is where MacCormick's second responsibility-attribution system comes into play. This is a scenario which is *not* based on the mechanisms outlined above, but rather seems to be based primarily on moral arguments of a different sort — as we shall see.

#### **11. The relationship between justice attributions, conduct governance, and societal types**

I have already alluded to some of the questions for responsibility-attributions which arise when government omissions lead to a perpetuation of economic inequalities. Turn now, then, to a consideration of the possibility of attributing justice-judgments to the acts (rather than the omissions) of a government associated with either rolling back policies of distributive justice or the passing of legislation which facilitates the generation of market order. Does the government in so acting assume responsibility for the justice of the particular circumstances of particular individuals? In at least the first case, it seems that they do. For such changes do affect particular individuals, and the government might know both who they are and how they will be affected. But ask oneself the question: what notion of responsibility-attribution underlies such a claim? Is it not one which imposes positive obligations — duties to act — on the government? What, then, is the underlying form of social relations which is presupposed by such an attribution?

What can be said quite clearly is that it is not one where individuals are acting on their own judgment under the governance of rules. A governance structure under which responsibility for the acts of individuals are attributed to a collective body and not to the

individuals themselves (the argument itself presupposes that “[n]o such inequalities are nor need be intended by any of the market’s participants” (MacCormick 1989, 48), and in which a central obligation lies on these collectives to follow *positive* rules of obligation, is not one in which individuals guide their own conduct using shared and predominantly negative abstract rules of conduct. Under this governance structure, responsibility for combinations of individuals’ actions is shifted from individuals to a collective body. The question that must be raised, then, is whether this shift in responsibility-attribution is itself compatible with the notion of justice in an abstract, *Gesellschaft*-type society. In other words, does such a shift undermine the notion of individual responsibility which in turn provides the foundation for the notion of justice in a *Gesellschaft*-type society? Is there not, then, a *competition* between differing notions of responsibility-attribution, and hence, a conflict between different notions of justice? Indeed there is. The scenario that MacCormick imagines is one predicated on shared *positive* rules of obligation. The question which must be addressed, however, is whether the degree of commonality which underlies such obligations exists in a *Gesellschaft*-type society, and whether such commonality being implemented is compatible or not with the mechanisms which support such a society.

Thus, the degree of commonality that MacCormick assumes exists and underlies judgments of justice would seem to be associated with *Gemeinschaft*-type societies, in which positive obligations could play a greater role in issues of justice. Yet is it precisely because of the difficulty of resolving disputes between *different Gemeinschaften* that the form of justice associated with a *Gesellschaft* emerges as important. In such societies, justice is primarily concerned with *abstract* commonality, and with supporting minimal obligations through predominantly *negative* rules of conduct. To see the difficulties this brings to MacCormick’s position, imagine, as his scenario does, that some members of a *Gemeinschaft*-type society attempt to transform its interactions to a more abstract, *Gesellschaft* form. If this occurs, the issue of justice becomes problematic. A *Gemeinschaft*-type society is governed by a notion of justice predicated on a higher degree of commonality than would be the case in a *Gesellschaft*-type society. Which form of justice, then, is to be used in judging whether or not the measures taken to support such a transformation are just? If one resorts to a *Gemeinschaft*-type notion of justice, this presupposes the existence of a higher degree of commonality between individuals than is present in an abstract society. Presumably, if such commonality existed, it could be used to judge the justice of the

transformation to a *Gesellschaft*-type. If, however, there are disagreements and a lack of substantive commonality between individuals — as seems to be presupposed by the idea of opposing factions, each supporting through their conduct their own ideal form of society — then a more abstract form of justice *must* be resorted to if the notion of justice is to remain intelligible. However, this move to a more abstract form of justice is a movement towards the form which is associated with a *Gesellschaft*-type society. Thus, there is a move to a *Gesellschaft* notion of justice in order to keep the notion of justice *intelligible*, and it is *this* notion which is brought to bear on the issue of whether such a transformation is unjust. MacCormick's argument implicitly *presupposes* that the changes which are being made are commonly shared obligations between the members of society, and hence that they are issues of justice. The questions which must be made explicit, however, are twofold. First, what is the relationship between these positive obligations and the minimal requirements of action and social life which, under the mechanisms which support the notion of justice, are manifested primarily through predominantly prohibitive rules of conduct? Second, by what mechanisms does MacCormick propose to support the positive obligations he values, and what are the implications of the operation of these governance types for issues of conduct governance more generally (such as its ability to support an abstract society, autonomous action, diversity, etc.)?

In essence, a *Gesellschaft* form of justice is a reflection of a failure of concrete commonality and of a lack of shared concrete goals. A concrete society's notion of justice is thus in some senses a *special case* of the more general form underlying an abstract society (i.e. it is the case where substantive commonality exists between all of its members). When substantial commonality exists between members of a society, *Gemeinschaft*-type justice is indeed a possibility. When such substantial commonality disappears, however, the only form that can retain an intelligible meaning is the *Gesellschaft* form. This type of justice is abstract and concerned primarily with supporting minimal obligations which are predominantly negative.

The question, then, of whether such changes in policy can be held to be the responsibility of the government, and hence can be judged to be unjust, is dependent on the notion of responsibility-attribution and justice which underlies such an inquiry. If there are substantive disagreements between the different *Gemeinschaften* of a society, the only form of justice which can remain intelligible is abstract, *Gesellschaft*-type justice. The question of



interest to this study in whether or not a government which abandons programmes of distributive justice is itself committing an unjust act is not merely whether or not the state of affairs of economic inequality is just or unjust but rather *how* we might choose to make it different. The claim that states of affairs can be unjust even if no individual or group violated a rule of justice implicitly assumes that conduct is separate from (and independent of) states of affairs. That is, this claim simply ignores the *mechanism* by which such states of affairs come into existence. It is sometimes argued, for example, that it can be notoriously difficult to determine which individual's or group's conduct contributed to the state of affairs coming into existence. But why should the fact that it might be impossible to determine precisely *who* violated a rule of justice determine the justice or injustice of a state of affairs? The answer to this is that unless some individual or group can be pointed to and individual or group responsibility attributed, one is simply *substituting* individual responsibility for collective responsibility. The question that remains unanswered, however, is whether such a substitution is compatible with the mechanisms which support an abstract society. The fact that individual or subgroup conduct cannot be pointed to merely skips over this difficulty and assumes away the problem. But it does not go away. If the conduct of *particular* individuals or groups which are at fault cannot be determined, are we not simply assuming that some method *other than* abstract rules of conduct *should* be adopted? And are these methods themselves compatible with the mechanisms of justice in an abstract, *Gesellschaft*-type society?<sup>36</sup> Unless individual spheres can be determined beforehand from abstract rules, one cannot guide one's own conduct in such society. Thus, the argument for collective responsibility leads to an undermining of individuals' abilities to act in a decentralized way. This is, I think, the decisive issue.

Thus, the question of whether the government *is* responsible for the inequalities which develop in a *Gesellschaft*-type society is replaced by a different question — *should* the government be responsible for such inequalities and their rectification? This "should" — this desire to resort to collective responsibility — must not ignore the fact that it is the notions of responsibility and justice compatible with an *abstract* society which impose

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<sup>36</sup> It would seem, then, that MacCormick's argument can be criticized for ignoring the institutional aspects which are essential for governing and resolving conflict in abstract societies — which is, in fact, an argument made by MacCormick himself in *Legal Reasoning and Legal Theory* (1978, 123-124) in which he argues, in essence, that moral notions lead to indeterminate results unless they are embedded in an institutional environment. That I am focusing on institutional aspects which exist at an *individual* level, rather than at the level of organizations, is of course one difference between our respective arguments.

restrictions on the forms of action which *can* be considered just or unjust, and that the fact that concrete individuals or groups cannot be blamed *manifests* the restrictions which are implicit in responsibility-attribution in an abstract society. To answer the question of whether the government should assume collective responsibility, an argument must be made that there is such a responsibility upon some collective body, *and* that this responsibility is compatible with the underlying form of social relations which govern a society where individuals disagree on many substantive goals and values.<sup>37</sup> I will consider just such an argument in the concluding section which follows.

## 12. On the intelligibility of the concept of distributive justice

These final sections turn to a more detailed consideration of an issue raised by Macleod's third question concerning Hayek's objections to the notion of distributive justice. This is the question of its meaningfulness. Macleod and others have been concerned to deny Hayek's claim that distributive justice is a *meaningless* concept, not merely an unrealizable ideal but rather an unintelligible one.<sup>38</sup> Though one might consider this argument to be of limited relevance (as I do), it can quite usefully serve to spotlight certain aspects of the perspective on conduct governance which this thesis adopts, and to emphasize the distance between this perspective and others which are familiar in legal theory. Moreover, it does constitute one of the recurring elements of objections to Hayek's critique of distributive justice and should, therefore, be addressed.

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<sup>37</sup> My view is that this is the meaning behind Hayek's claim that the argument for the possibility of distributive justice is a demand that "the members of society should organize themselves in a manner which makes it possible to assign particular shares of the product of society to the different individuals or groups" (Hayek 1976, 64). The central moral question to Hayek, then, is "whether there exists a moral duty to submit to a power [i.e. governmental institutions] which can co-ordinate the efforts of the members of society with the aim of achieving a particular pattern of distribution regarded as just" (Hayek 1976, 64). *If* the "existence of such a power is taken for granted, the question of how the available means for the satisfaction of needs ought to be shared becomes indeed a question of justice" (Hayek 1976, 64). To Hayek, the possibility of such power existing is not the issue. Rather, the question is whether such a power *should* exist. His argument is that it should not. The question of interest to Hayek, therefore, is "whether it is moral that men be subjected to the powers of direction that would have to be exercised in order that the benefits derived by the individuals could meaningfully be described as just or unjust" (Hayek 1976, 64), and not whether such direction is merely a possibility.

It might be added that Hayek also claims that the moral duty to submit to such power creates a feedback loop which reinforces itself. That is, he argues that "the more dependent the position of the individuals or groups is seen to become on the actions of government, the more they will insist that the government aim at some recognizable scheme of distributive justice; and the more governments try to realize some preconceived pattern of desirable distribution, the more they must subject the position of the different individuals and groups to their control" (Hayek 1976, 68).

<sup>38</sup> Spelled out in *Law, Legislation and Liberty*, vol. 2, *The Mirage of Social Justice* (1976, xi-xii, 62-100).

There are two strands to the unintelligibility argument. First, it is argued that the implementation mechanisms of distributive justice would be incompatible with the mechanisms which subject individual conduct to the governance of rules and which support an abstract, *Gesellschaft*-type society. I will return to this argument after considering its close cousin: the argument that there are no rules of conduct governing distributive justice. This claim is not merely that there are no commonly shared rules of conduct governing distributive justice. Hayek's claim is a stronger claim than this. His argument is that different individuals do not follow regularities which could be termed rules of distributive justice, and hence that there are no rules whatsoever of distributive justice.<sup>39</sup> On this view, there are not only no rules of distributive justice shared across individuals, but there are also no individual-specific rules which, though differing across individuals, govern conduct. This is a broad and sweeping claim, and one that denies the very existence of rules of distributive justice, be they objective *or* subjective. Under Hayek's notion of meaning, if someone refers to something in which there is no regularity of meaning — implying that the concept cannot be defined using rules (even individual-specific ones) — then that concept is not merely context-dependent but also meaningless. It is, then, not merely that individuals know situations governed by distributive justice when they encounter them in concrete situations, but rather that they are using different classifications for each of these situations, and hence they are not governed by the same classifications or the same meaning. If this is the case, then distributive justice would be a meaningless concept, for there would be no universalizable, consistent and coherent way of defining it — even to the individuals themselves. This is, I believe, the criterion of meaningfulness that Hayek refers to when he describes distributive justice as a meaningless ideal. If true, this would be an extremely forceful criticism.<sup>40</sup>

Is there anything to this criticism of meaningfulness? Perhaps there is, for the reader might recall that one notion of freedom — positive freedom — had a very similar difficulty.

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<sup>39</sup> As in Hayek (1976, 69-70), where he claims that social justice is a mirage because "the intuitive feeling of indignation which we undeniably often experience in particular instances proved incapable of being justified by a general rule such as the conception of justice demands". One must be careful to keep in mind that Hayek is arguing that "there are no conceivable rules of just individual conduct which would at the same time secure a functioning order" (Hayek 1976, 69-70), and not merely that distributive justice has no meaning in *any* type of social system. Hayek's argument, then, is that the ideal of social justice is incompatible with certain forms of conduct governance. In other words, his claim is that "no system of rules of just individual conduct, and therefore no free action of the individuals, could produce results satisfying any principle of distributive justice" (Hayek 1976, 69-70).

<sup>40</sup> Which might also explain why Hayek chose to refer to the notion of social justice as a "mirage".

This notion turned out to be impossible to universalize because one could not formulate a general rule which could define positive freedom in all situations in the same way for all individuals. In other words, while some individuals might be free under this definition, others would, by the same definition, be unfree. This contradiction within the definition arises because of the possibility of *conflict* engendered by the positive nature of the definition. Under this definition, then, two individuals can be free in theory to perform an action and yet it would be impossible in practice for both of them to simultaneously perform that act. This tension between theory and practice implies that in concrete cases it might be impossible to say who is free and who is not under this definition.<sup>41</sup> There are at least three possible solutions. First, one might turn the definition of freedom into a matter of degree. Thus, individuals could be free to certain degrees, and unfree to others. Whether this addresses the question of whether individuals are free to perform *particular* actions is, however, doubtful. Second, one might attempt to define all of the circumstances in which conflicts between the same rule might occur and to define who is free and who is not for each particular set of circumstances. This, unfortunately, does not resolve the underlying difficulty, for if *each* party to a conflict satisfies the same criteria, who then is free? Third, one might be willing to say that both are free in theory but not in practice. The question this raises, however, is the intelligibility of a concept of freedom which engenders such contradictions in its application. This “solution” would entail that in practice the application of this notion of freedom would depend upon the particular choices of the particular observer. This is, then, a “solution” which builds in subjectivity at its very foundations.

The question which all of this raises for notions of distributive justice which are based on positive rules of conduct is whether such subjectivity *necessarily* implies that there are *no* rules of conduct governing distributive justice, including those which differ across individuals *but* which are nevertheless regular in *their* conduct. This brings us back to Hayek’s first objection: that the governance mechanisms of distributive justice are incompatible with the mechanisms which subject individual conduct to the governance of abstract rules. Why would this argument be important in determining the intelligibility of distributive justice?

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<sup>41</sup> Unless, of course, one defined all of the circumstances in which conflicts between the same rule might occur and the manner of resolution in such circumstances. Unfortunately, this does not resolve the difficulty, for if *both* parties to the conflict satisfy the same criteria, what then is to be done?



The answer to this depends upon two crucial qualifications which underlie the discussion that follows. The first qualification is that Hayek's arguments are applicable *only* if the minimal conditions for action and social life are fulfilled. As has been argued in the previous chapter, the notion of freedom and that of justice presuppose that these minimal conditions have, in general, been fulfilled. This is an important qualification, for arguments concerning distributive justice can consist of two strands of thought.<sup>42</sup> First, there is the strand which focuses on the obligation upon members of a particular society to ensure that the minimal conditions for action and social life are fulfilled for each and every member. This is a strand of thought which Hayek (and I) would support, though it might be argued that Hayek would not consider such obligations to be a matter of justice, but rather a matter of the pre-conditions for the existence of justice attributions. Be that as it may, this strand differs from a second thread, which emphasizes the distribution of that which is based upon minimal conditions which have already been fulfilled. This is the type of distributive justice which is the focus of Hayek's criticisms.

The second qualification which must be made is that Hayek's arguments concerning distributive justice presuppose a certain type of environment in which they operate. Hayek's arguments are implicitly conditioned upon forms of distributive justice which operate in *complex* societies. This brings us back to the perspective which underlies this thesis. This thesis has adopted a notion of rules and rule-following which leads one to examine the implications for the performance of individuals in their day to day conduct. The emphasis of the work has been upon how individuals strive to integrate their conduct in such a way as to produce regularity. The argument of the work is that regularity of conduct comes about because individuals are governed by certain mechanisms which allow for the integration of conduct. In effect, these mechanisms form the foundation for governance by abstract rules of conduct. The crucial issue from this point of view is *how* certain states of affairs are brought about — and this is where arguments of distributive justice come under examination. Many of these notions are based on the idea that certain states of affairs are unacceptable. This in itself is not objectionable, but when performance is demanded to eliminate these states of affairs, it becomes of some interest to ask *how* such states will be eliminated. An even more pertinent question refers to the governance properties of the rules

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<sup>42</sup> It should be stressed that this is a simplification for the purposes of emphasis only, and that many notions of distributive justice emphasize both of these aspects at the same time.

of conduct which individuals must adopt in order to ensure that notions of distributive justice are realized. This leads to what is probably the most important question in this vein: whether there are in fact any rules of conduct which individuals *could* follow which would implement ideals of distributive justice, and at the same time sustain the complexity and regularity required by social life in the society in which they are embedded.

In my view, the answer to this question hinges upon the *type* of society — the type of environment — to which one applies such judgments. I would be the last to deny that there could, and do, exist regularities of conduct manifesting the notion of distributive justice *within concrete groups*. It is important to acknowledge this, and to point out that Hayek's argument, if extended into this realm, is probably incorrect. If Hayek's argument is taken to mean that the notion of distributive justice is meaningless in such spheres, then it can (and should) be argued that this is, at the least, not obvious, and that it is, in my view, simply wrong. I would contend, then, that distributive justice is a meaningful ideal within such concrete groups. The question of interest from the point of view of this discussion, however, is whether such regularities can be extended into wider society, and in particular into complex abstract societies in which an individual might find oneself. I would argue that there are a couple of factors which go against this. First, and probably most important, is the fact that many notions of distributive justice refer to system-wide qualities which are not within the scope of knowledge of individuals guiding their own conduct by following abstract rules. As well, such qualities are fundamentally relative, depending upon the relative rank of different individuals within some set of aspects which acts as the criterion upon which judgments of distributive justice are made. For such judgments to be made at all, there must be a substantial abstraction which narrows down this set of aspects to a "manageable" level. It is sometimes forgotten, for example, how abstract the concept of "income" is — yet it represents a substantial reduction of complexity from the myriad of different particulars which contribute to its definition. It is the *systemic* nature of some conceptions of distributive justice, flowing from the inherently *relative* nature of distributive justice, which makes its implementation, through abstract rules of conduct which presuppose autonomy, seem quite unlikely.

The second factor arguing against the extension of certain forms of distributive justice to complex societies is that certain forms presuppose the existence of systems of positive rules which are capable of implementing their notion of distributive justice, while at the same

time supporting the social structure of a complex, abstract, society. The difficulties surrounding governance by positive rules have been outlined throughout the work, but at this point it is probably sufficient to say that their increasing levels of concreteness in situations of increasing complexity, combined with the knowledge requirements of system-wide definitions, makes them acceptable as methods of governance only in relatively familiar concrete situations which are not overly complex.

The essential point, then, is to make a clear distinction between the types of environments to which one is referring when discussing the notion of distributive justice. In situations of social complexity, a Hayekian would argue that both of these points imply that there might in fact be no rules — in the sense of *individual-level autonomous performative regularities* — of distributive justice at all. What this means is that in such environments it may not be *possible* for *individuals* to simultaneously *act regularly, under their own judgment*, and to follow rules of conduct which allow for distributive justice to emerge as a result. Note that this notion of rules is distinctly different from one which views rules merely as articulations or as concepts which are disconnected from conduct. The notion of rules which leads one to argue that there are no rules of distributive justice is a vision which views rules from a performative perspective. If a “rule” of conduct *cannot* produce regularity of conduct — if a rule cannot be applied by individuals with regularity in circumstances which can be recognized as being subject to rules (including unarticulated rules), if a rule builds in a resort to subjectivity and arbitrary judgment based on individual-specific details, in what sense can these “rules” of conduct be termed rules? The answer is: in a conceptual sense, as “abstract” expressions, and as hypothetical normative conceptualizations. Each of these has, however, *disconnected* rules from regularized performance.

From the point of view of this thesis, the important question is whether or not a rule is capable of engendering regularity in a particular type of environment. The interests of this thesis lead it to focus on the preconditions of regularity where individuals are directing their own conduct and where they are confronted with situations of complexity. All of this has implications for views of rule-governance which espouse the *creation* of articulated rules. Some questions which arise when one creates rules include (a) whether these rules mesh with ongoing rules of conduct and hence enhance or undermine regularity, (b) whether the degree of particularity of these rules is such that regularity is promoted in situations of

complexity, and (c) whether these rules impose positive obligations which are abstract enough to allow for adjustments to complexity and yet which are specific enough to allow for autonomous action. The underlying issue, therefore, is whether a system of rules of conduct is up to the task of supporting the type of social environment which underlies the argument for its adoption.

### 13. Conclusion

One might well be wondering whether this argument comprehends the notion of distributive justice at all. Surely, it may be argued, such a notion presupposes positive obligations and hence is not going to be based on the same mechanisms as those which filter particularity and positivity in an attempt to subject individual conduct to the governance of rules. On such a view, there is nothing objectionable to establishing collective organizations which put into practice the concept of distributive justice. Up to a point, I would agree, and would argue that Hayek is mistaken if he argues that such collective efforts do not represent implementations of distributive justice. There is nothing in the theory of this work which would preclude the implementation of notions of distributive justice through organizations based on positive rules of detailed particularity *so long as* these organizations were based on the substantive agreement of individuals on at least the abstract aspects of what they considered to be their notion of distributive justice. *If* (a) these organizations operate on a foundation of substantive agreement, and if (b) they act in such a way that they do not come into conflict with the mechanisms supporting the principle of the Rule of Law, there is no difficulty with implementing such measures. As I have stated previously, the only point at which a notion of distributive justice runs into difficulties under a Hayekian view is when it conflicts with the mechanisms supporting the principle of the Rule of Law. If there is no conflict between short-term, more particularistic goals and more long-term values and obligations, then there will be no incompatibility between whatever individuals term distributive justice and the principle of the Rule of Law. The difficulties arise when conditions (a) or (b) are not satisfied. If there is not substantive agreement on at least the general principles to be followed (implying an abstract agreement on positive principles), some individuals could end up coercing others. This is where the conflict with the principle of the Rule of Law emerges, and this is where the problems begin.



While it might seem like a small price to pay that a small number are coerced while a greater number are benefited, the difficulty that such conflicts reveal is much more significant than merely one of trade-offs between coercion and benefits. The difficulty with coercive measures is that once mechanisms which are based on implementing particularistic rules are established, there is the potential (but not the certainty) that the substantive goals of distributive justice can be supplanted by *other* substantive goals. The mechanisms which support a *Gesellschaft*-type society are indiscriminate in their filtering out of particularity (and the positive rules which are associated with this) because there typically exists no objective criterion by which to consider such substantivity. Thus, the indiscriminate filtering of these rules is based on the need to exclude *as a rule* all forms of particularity and positivity. These mechanisms work on the premise that it is not simply a question of whether such mechanisms are in “good” hands or “bad” hands which is of decisive importance. Rather, the fundamental question is whether there should be *any* rules of this sort allowed to exist and govern the social conduct of all individuals. The implicit assumption of this view seems to be that what is required is an all-or-nothing exclusion of such society-wide substantivity, for any attempt to incorporate it into the governance mechanisms of a *Gesellschaft*-type society would lead to a situation where substantive ends (“good” or “bad”) might be imposed on individuals contrary to their own substantive goals. This argument, then, is based on an explicit admission of ignorance in ranking conflicts between substantive goals insofar as they do not conflict with the abstract and predominantly negative rules of conduct which provide the foundations for a complex, abstract society. These conflicts between substantive goals cannot be resolved in a way that is objective, and it is for this reason that they are filtered out by the legal mechanisms which govern a complex, abstract society.

The question from a Hayekian perspective is not, therefore, whether there can be some body or organization established which acts in a regular way and which implements something which is *termed* “distributive justice”. This is obviously a possibility. But rather the question is whether this implementation of “distributive justice” agrees with individuals’ abstract notions of distributive justice. An additional question is raised when one considers the governance properties of the mechanisms used to produce this “distributive justice” raise yet another. Do these mechanisms undermine the ability of individuals to act autonomously and to adjust to complexity by following their own plans of action? Do these mechanisms

coerce individuals by imposing the substantive goals of some over the substantive goals of others? And how are coercive “impositions” to be distinguished from positive rule-based implementations of the common minimal conditions required by social interaction?

These issues represent fundamental problems for which I believe there are no easy answers. Substantivity is necessary to fill in the content required by systems of positive rules which aim at implementing some of the minimal necessary conditions for social life, yet substantivity is filtered out by legal mechanisms which strive for decentralized conduct governance by abstract and predominantly negative rules. Legal mechanisms in effect operate on the assumption that the minimal conditions for social interaction have *already* been fulfilled, and hence they work to exclude particularity and substantivity from social governance. Legal mechanisms, then, are geared towards excluding particular forms of governance. If, however, these forms of governance are allowed to enter the legal sphere and are not filtered out (for whatever reason), legal mechanisms do a poor job of filtering out the particular concretes required and presupposed by these governance forms.

The argument that legal mechanisms *are* capable of supporting shared obligations and values which entail positive rules of conduct is, in my view, based on an oversight into the effect of complexity on these rule-systems. The particularity of these rules, and the nature of positive rules which require evaluations to be made of the relative positions of individuals (under some set of classifications) are the very properties which, for the most part, exclude these rules from passing through legal mechanisms. And yet some of the obligations are crucial to the existence of social interaction for some individuals and, indeed, to the existence of individuals at all. Legal mechanisms can allow substantivity of certain forms to pass through, but the difficulty remains that once substantivity is allowed to enter, it becomes possible for particular substantive ends to be, in effect, hijacked by the particular interests of particular groups and used for their own particular ends.

All of this points to the importance of distinguishing *which* substantivity *should* be allowed to pass through legal filters, and which should be filtered out. It is not the goal of this particular chapter, nor of this thesis, to delve into this issue, except to say that there are certain minimal conditions which must be met by all individuals, and which, in certain cases, some individuals are not able by their own efforts to meet. This becomes of even more pressing concern as the complexity of society increases, for one's growing interdependence on others implies that few individuals are able, on their own, to satisfy these minimal conditions. In my view, this provides one of the most compelling arguments for the

forms of distributive justice which strive to ensure that these minimal conditions are met for all members of society. But where the line is to be drawn between minimal conditions, and the goals which build upon these, is the subject of another, much more detailed, study which shall not be undertaken here.

# The Foundations of Conduct Regularity

## Rules of conduct, neural networks and the systemic nature of mind

### 1. Introduction

That which is most familiar is often least understood. This will be, perhaps, the central argument of this chapter. Consider abstraction. This familiar, everyday activity is performed by most individuals, yet the question is — *how* does it take place? How do we abstract? Or consider what it means to know something. How is this done? Is it as simple as it seems from our internal perspective? Or consider conduct regularity. This phenomenon, familiar in all of our lives, would be considered a most remarkable thing if it were not so commonplace. The same applies to morality, language, and reasoning. How is it that we come to have moral concepts? Or the ability to use language? Or to be able to think and reason?

This chapter turns to an investigation of the commonplace, in an attempt to show that what is common in practice is actually much more complex in principle. The justification for such a turn in the thesis rests on the insight that the difficulties that traditional legal theory encounters stem from a common cause — a lack of understanding of the foundations upon which all legal theory rests.

Consider the Hartian positivist legal enterprise. This is a theory which represents law as resting upon a foundation of authority and conduct regularity. Hartian positivists look to see if these exist as “social facts”, yet they consistently fail to examine the foundations of such “facts”. It is as if these thinkers simply assume that there is no relationship between these so-called “facts” and the foundations upon which they rest. This blindness to the foundations of authority and conduct regularity can lead one into strange territory. The previous chapters have argued that the implicit view of these thinkers seems to be that “authority” is necessary for social order. If this is so (and it is at least plausible), why is



there no investigation into the mechanisms generating and supporting authority — not at a particularistic, historical level, but rather from a more theoretical perspective?<sup>1</sup>

This lack of interest in mechanisms which generate and support regularity, which provides the basis for the social phenomena of “authority”, is perhaps matched only by an even more comprehensive lack of insight at the individual level. At this level, “facts” abound — individuals are presumed to be able to think, to follow rules, to articulate, to have values, etc. — and yet there is short shrift given to the foundations of these remarkable activities. What is it that allows individuals to be *able* to follow rules? To think? To reason? And might these be inter-related?

Now, one might be tempted to argue that the solution to these problems at the individual level lies in the concept of “socialization”. Individuals, so the argument goes, are socialized into pre-existing patterns of behaviour by the individuals that surround them. But what exactly does this explain? Does it explain *how* individuals come to absorb these pre-existing constructs? Does it explain how they are *capable* of absorbing and retaining them? And does it explain where these “pre-existing” constructs come from? It is as if one tried to explain the growth of a tree by pointing to the soil and saying “this pre-exists the tree, and the tree grows from it”. The question, however, is *how* this takes place.

All of this relates to the persistent concern of this thesis with the foundations of social regularity. This thesis, in common with most other studies in legal theory, has simply presupposed the existence of rules of conduct, morality, reasoning, abstraction and the like — yet one of the most telling criticisms of alternative views of legal theory is that they do not understand or investigate their own foundations. It would be disingenuous to claim that by ignoring the foundations of conduct regularity, other studies have simply *presupposed* that certain concepts and abilities exist, while at the same time committing exactly the same methodological error.

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<sup>1</sup> As was discussed in the introduction to this thesis, the argument is not that positivists have no interest in investigating the nature of authority, for much of their enterprise is explicitly concerned with investigations into authority — what it is, how it operates, etc.. But these are different questions from the concerns of this work. Positivist theoreticians *do* focus on the nature of authority, but their investigations are limited by their implicit assumption that the existence (or lack of existence) of authority is a matter of “social fact”. Positivist investigations take place under this implicit presupposition. This study, on the other hand, turns to an examination of the foundations of this “social fact”, and in essence asks the question of *how* this “social fact” *could* have come into existence. In other words, this study makes a question of how it could be the case that authority *could* exist, and does not limit itself to the question of how authority operates once it is *assumed* to exist.

This study has no intention of committing the same error. This thesis has argued that many of the mistakes of legal theory, and in particular, of the positivist school of thought, can be traced back to the single fundamental error of not taking into account the foundations upon which all legal theorizing rests. This chapter represents an attempt to introduce these foundations.

But what, then, are the foundations of this work? Consider what this thesis has tried to achieve. Previous chapters have investigated the foundations of rules of conduct. They have argued that these rules are generated by filtering mechanisms which act as selection processes over individual conduct. The argument has been, then, that regularity in human conduct comes in large part from *within* individuals, and that the mechanisms which generate and sustain this regularity have an important role to play at the individual level. In this vein, it has been argued that legal theory should pay more attention to the generation and preservation of individual-level regularity in conduct, and that proportionally less emphasis should be put on issues of authority and the conscious and deliberate application of articulated rules. This argument is in turn based on the idea that the application of authoritative articulated rules itself presupposes the existence of regularity in conduct, the sources of which typically go unexamined.

By adopting a different focus one can also see that this argument as to the foundations of legal theorizing also flows from the different notions of rules and rule-following which underlie each approach. On the one hand there are theories which emphasize issues of authority, with an emphasis placed on authorized articulated rules and their deliberate creation and application. These are theories which stress an *externalized* notion of authority, under which articulated rules are “applied” by some individuals to the conduct of others. The theory of this thesis, on the other hand, emphasizes rules of conduct as they are manifested in conduct. Such rules are not necessarily the product of deliberate design, nor are they necessarily articulated or consciously applied. Moreover, such rules need not presuppose the existence of an externalized authority under which certain authorized individuals “apply” authoritative rules to the conduct of others. This thesis, then, emphasizes the role, importance and source of regularities of conduct. On this view, the term “rules” applies, in large part, to widespread *performative* regularities and to articulations of these pre-existing regularities, while the phrase “to follow a rule” refers to

the ability to manifest that regularity in one's conduct.<sup>2</sup> This perspective on rules emphasizes their performative aspects, and stresses that such rule-following is a widespread phenomenon, and is not specifically restricted to the legal sphere.

## 2. What are the questions?

The questions which flow from all of this are twofold. First, where does regularity in conduct come from? In other words, why is there regularity in conduct? Why not irregularity? Second, how is this regularity generated and preserved? What are the mechanisms which sustain regularity?

There are two levels which might be addressed in answering these questions. In the general attempt to answer the "why", this work has sketched out the view that abstract rules of conduct are adaptations to complexity. Moreover, it is the following of these rules which allows for complexity to develop and extend over time and space. Moreover, the work has argued that such rules provide the foundation for the moral notions which animate an

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<sup>2</sup> The distinction between rules which are viewed as articulations which are consciously known and obeyed, and rules which are viewed as performative regularities which might not be articulated nor consciously followed, is of crucial importance to this thesis. Consider, for example, the distinction between one's conceptual notion of space-time and its performative cousin. Individuals can and do differ in their conscious and conceptual knowledge of space-time. But, from the point of view of this thesis, what is essential is the performative notion of space-time which manifests itself in their conduct. Thus, the notion of time is from the perspective of this thesis manifested in what might be generally termed *memory*, while space is manifested in a variety of *spatial abilities*. The performative notion of space-time underlying this thesis is made up of a variety of abilities and activities which have evolved and which manifest themselves in individuals' conduct. The performative notion of space-time underlying this work may, therefore, differ from or conflict with individuals' attempts to conceptualize or articulate it.

This is a fundamental distinction, the importance of which cannot be overestimated. This chapter, and the ones that came before it, focus on *how* individuals conduct themselves in space-time. This thesis claims that the "notion" of space-time which underlies different individuals' *conduct* is similar across individuals. Put differently, the argument is that it is the *way* in which an individual's *performance* relates to her/his environment (i.e. their performative competence) which is similar across individuals (I suspect that this same degree of similarity does not necessarily extend to the uses these competences are put towards, nor necessarily to individuals' conceptualizations or articulations of these competences). The reasons for this performative similarity are evolutionary. If the conduct of an individual relates to space-time in a substantially different way from other individuals their survival prospects would be substantially diminished. If memory — relating to events in the past, even to the immediate past — is substantially different for the notion underlying the conduct of other individuals, (say, individuals remember objects and events which exist *only* in their minds), one's actions can become detached from one's environment, and there is a danger that one's survival prospects might be in jeopardy, depending, of course, on the *degree* and *importance* of any such detachment in determining one's survival potential. The same would hold for a different notion of space, as manifested in conduct (say, one continually grasped in the wrong place for various objects). This chapter and the work as a whole focuses on the performative notion of space-time, and one's abilities reflect the implicit and often times unarticulated notion of space-time individuals can typically act out but perhaps cannot articulate. It is, then, the common capacity of individuals to *relate* to the spatial and temporal aspects of their environments to which this, and previous, chapters are referring when discussing the "notion" of space and time.

abstract and complex society. In particular, governance by commonly obeyed rules of conduct which manifest themselves as that which regularly does *not* occur, provides the foundation for objective judgments and hence for the possibility of objective justice.

Turning to the question of how regularity comes to exist, the general argument has been made that various mechanisms exist to generate and support abstract rules of conduct. Various chapters have emphasized that these filters on particularity operate both in institutional settings (where the focus of attention is on articulated rules and their deliberate creation and application) and at an individual level (where the focus is turned to unarticulated rules and their manifestations in conduct).

This is not the end of the story, however, for there exist alternative answers to these questions — answers which in an important way provide the foundations for these questions. This chapter, then, takes the answers to the questions of the “how” and the “why” of conduct regularity one step further. To do this, this chapter turns to a theoretical examination of how regularity comes to exist in the very structure of mind itself, how minds abstract, how reasoning, morality and language come to be embedded in individual conduct. It is to these issues that this chapter turns its attention.

To answer these questions, this chapter takes a journey into the challenging territory occupied by the philosophy of mind, and examines one school of thought among the many that make a claim to our attention: the neurophilosophical<sup>3</sup> point of view. After spelling out why it is that this perspective is the focus of this chapter, I turn to two inter-related tasks. The first of these is to outline a neurophilosophical theory of mind which could serve as the basis of the thesis here presented. The goal will be to provide the outlines of the foundations for conduct regularity in its many and varied manifestations (including thought, language, etc.). This theory will draw upon aspects of Hayek’s work in this area, but it will not be restricted exclusively to his insights. The chapter’s second goal is to investigate some of the implications of this theory of mind for the thesis in hand. It should be stressed at the beginning that my discussion will be quite a general one, with this chapter providing nothing more than a sketch of the rough outlines of a Hayekian perspective on the foundations of conduct regularity. This chapter, then, represents the provisional beginnings of a new line of investigation for legal theory.

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<sup>3</sup> A term I believe was introduced by P.S. Churchland (1986).



One further qualification on this study should be noted at the outset. This chapter is in some senses independent of the chapters that have gone before it, in that the arguments and conclusions of earlier chapters are not necessarily predicated upon one adopting the neurophilosophical approach of this chapter. Though this chapter provides one possible foundation to the investigations of previous chapters, this is not necessarily the *only* foundation which is compatible with the arguments there presented. One should keep in mind, then, that if one rejects the approach of this chapter, one is only rejecting one possible explanation for the foundations of conduct regularity, and that such a rejection does not imply that the analyses of previous chapters must be abandoned as well.

### 3. Why adopt a neurophilosophical approach to mind?

The theory of mind to which this chapter refers is often termed the *materialist* perspective on mind, although it is probably more accurately called the *neurophysiological* or *neurophilosophical* theory of mind. This approach, though speculative, is a familiar one in psychological, cognitive science, and philosophical circles, and is characterized by being based on a large body of empirical and theoretical work in physiological psychology, such as that which is summarized in standard textbooks,<sup>4</sup> and popularized in many recent books.<sup>5</sup> The investigations of this chapter into the theory of mind will rely on an approach very similar to the ones spelled out in these works, although it will not go into any level of physiological detail. Instead, the approach is similar to one introduced by a pioneer in the neurophysiology of mind literature — F.A. Hayek. The chapter focuses, then, on general issues and their implications, and tries to provide an overview of some of the issues which might be of some interest to legal theory and the study of conduct regularity and conflict-resolution.

The main reason for adopting a theory of mind, and in particular, one having a neurophysiological perspective, flows from its importance to the enterprise undertaken in this work. That such an approach is important was also recognized by Hayek, and is emphasized by his detailed and sustained investigations into the neurophysiological bases of

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<sup>4</sup> Such as Thompson (1967), Churchland and Sejnowski (1992), Rosenzweig, Leiman and Breedlove (1996) and Kolb and Whishaw (1996).

<sup>5</sup> Such as Hebb (1980), Searle (1984), P.M. Churchland (1988; 1995), Dennett (1992), Edelman (1992), Flanagan (1992), Humphrey (1992) and Damasio (1994).

mind.<sup>6</sup> Hayek's theorizing is intimately intertwined with and fundamentally dependent upon such a theory of mind. Moreover, Hayek's focus on the restrictions imposed on mind by its existence in space and time, his emphasis on performative knowledge, and his stress on the restrictions that each of these imposes on conduct governance mechanisms simply cannot be properly understood without at least a minimal understanding of the theory of mind which underlies them.<sup>7</sup>

Much of this thesis is in a similar manner dependent upon an underlying theory of mind. Though I have pointed out above that the reader does not have to adopt the particular approach outlined in this chapter for the previous chapters to "make sense", it would be difficult to understand the choice of *emphasis* in this work without some understanding on *why* certain aspects (such as those relating to performative knowledge, and the restrictions on knowledge imposed by existence in a particular space and time) have been investigated in intimate detail while others have been granted only a cursory glance. Moreover, it would be difficult to understand the basis for many of the claims of this work without simply presupposing the possibility of a more fundamental basis for conduct regularity. The decision to emphasize mechanisms of conduct governance is based upon an interest in investigating their relationship to and compatibility with the mechanisms constituting mind. At its foundation, this thesis represents a sustained investigation into the mechanisms of abstraction which are the source of rules of conduct which generate and sustain order, both for individuals and for society more generally.

This being said, I should stress once again that the chapter is not so much interested in the particulars of a Hayekian theory as in outlining its general themes, and in outlining its relevance to legal theory and to the chapters which have preceded this one.<sup>8</sup> There are two

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<sup>6</sup> These investigations are found in works such as *The Counter-Revolution of Science: Studies on the Abuse of Reason* (Hayek 1979a) and in particular, the section "Scientism and the Study of Society"; *Individualism and Economic Order* (Hayek 1948), especially "The Facts of the Social Sciences"; *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology* (Hayek 1952); *The Constitution of Liberty*, especially Part I; *Studies in Philosophy, Politics and Economics* (Hayek 1967), especially "Degrees of Explanation", "The Theory of Complex Phenomena", "Rules, Perception and Intelligibility", and "Notes on the Evolution of Systems of Rules of Conduct"; *Law, Legislation and Liberty* (Hayek 1973; 1976; 1979), including all three volumes; *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Hayek 1978), in particular "The Errors of Constructivism", "The Primacy of the Abstract", and "The Confusion of Language in Political Thought"; and finally, *The Fatal Conceit* (Hayek 1988), especially chapters one to six.

<sup>7</sup> A point emphasized in Gray (1986), in his insightful discussion of Hayek's notion of mind.

<sup>8</sup> For instance, I do not focus on what might be considered to be the errors in Hayek's analysis, such as his stress on the "equipotential" nature of mind, when it is a commonplace of contemporary neuropsychology that some neural networks do in fact seem to be associated with particular activities of mind (Kolb and Whishaw 1996, 551-553), nor do I view some of the philosophical implications Hayek draws from his theory of mind (Hayek 1952, 165-194) as being necessarily pertinent to this thesis or even necessarily correct.

themes in particular which deserve special emphasis. First is the idea that mind is a mechanism of classification, a sphere within which expectations are generated and run through a process of selection for their compatibility with their environment and with the other ongoing processes and anticipations of mind. On this view, mind is an anticipation mechanism.<sup>9</sup> Such anticipations are intimately related to conduct in that potential paths of action are “tested out” in the expectational sphere before manifesting themselves as actualized performance. This has obvious implications for legal theory, as has been argued in earlier chapters.

Second is the idea that mind operates as an interconnected system.<sup>10</sup> This integrative approach is important for a number of reasons. First, it emphasizes the dependence of mind upon its environment. In particular, this implies that under our neurophysiological theory of mind, the activities of the body — which are a part of mind’s environment — are essential in contributing to the nature of mind. As will be outlined below, the Hayekian view is that mind is the activities of the central nervous system (as manifested in interconnected networks of neurons) which are built up by the interaction between this system and their environment. An integrative approach implies that these activities cannot simply be detached from their environment, but rather that the environment is fundamentally intertwined with the existence, configuration, and weighting of the interconnected neural networks constituting mind. This point serves to emphasize the interactive nature of mind and its environment, and reinforces the point that the expectations of individuals are critically dependent on interaction with, and reinforcement from, their environments.<sup>11</sup>

Another aspect of this integrative approach is that such a view rejects approaches which attempt to divide mind into separated, compartmentalized systems which do not interact.

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<sup>9</sup> See Dennett’s similar argument that brains are “anticipation machines” (1992, 177).

<sup>10</sup> This theme rests upon two implicit assumptions which bear mentioning. The first is what is typically called the *brain hypothesis*, which is the view that “the brain is the source of behavior” (Kolb and Whishaw 1996, 3). The second assumption is similar, and relates to the *nature* of systemic quality of mind. This is the idea that mind operates as an inter-connected system of neural networks, which are in turn comprised of individual neurons connected in a variety of ways. While works in neurophilosophy typically adopt what is sometimes called the *neuron hypothesis*, which states that the basic building block of neurophysiological theory is the neuron (Kolb and Whishaw 1996, 3), or less frequently, what might be called a *neural network hypothesis* (under which the basic building blocks are networks of interconnected neurons), this is not sufficient for investigations of mind as examined in this thesis. Instead, what is required is an emphasis on the *holistic* nature of mind, and the fact that neurons and neural networks lead to the constitution of mind only in their interactions, both with each other and with the environment external to the organism.

<sup>11</sup> Both from the point of view of the more limited time-span of an individual’s life-span, and a more encompassing perspective, which takes into account the effects of the interaction between organisms and their environment from a species level over more extended periods of time.

The perspective of this thesis, however, stresses the interrelationship and fundamental dependencies between the various systems of mind, and emphasizes the integrated nature of sensory, motor, linguistic, spatial, emotional, rational, conceptual, and other processes ongoing within mind.<sup>12</sup> Each of these processes has a role to play within mind, and the effects of each process often depend upon the effects of other ongoing processes of mind. Moreover, a systemic perspective emphasizes the idea that in their abstract structure the processes of mind differ more by degree than they do by type. The various processes of mind — sensory, emotional, rational, conceptual, to list but a few — are based upon the same *types* of activities.<sup>13</sup> Between these processes, the activities that occur differ more by matters of degree than by matters of type. All of the processes of mind are viewed as being based on the interaction between the activation of neural networks by events in the environment and activities pre-existing within these same networks.

Traditional legal theory could benefit from these insights, for theories such as positivism which presume a top-down imposition of authority often underestimate, if not totally ignore, the fundamental inter-relationship between the expectations of some individuals and the conduct of others (whose actions, in part, constitute the environment of these individuals). In this vein, positivist legal theory could be called into question for its emphasis on the *separation* between fact and value, when what should be stressed is their essential interdependence via interaction and feedback.

#### 4. The Hayekian theory of mind

The Hayekian theory of mind to be discussed in this chapter is based in large part on the extension of certain themes present in the work of F. A. Hayek. Hayek's work on the theory of mind was an ongoing project throughout his life, but his most definitive statement of it was presented in 1952 in his somewhat misleadingly titled *The Sensory Order: An Inquiry into the Foundations of Theoretical Psychology*. Though the title of the work focuses attention on the sensory order of mind, this is not in fact the focal point of the book. Rather, Hayek's goal in the book was to set out the framework for a neurophysiological theory of *mind*. *The Sensory Order*, then, represents an extended investigation into the theory of, and

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<sup>12</sup> This is a point which receives particular emphasis in Hayek (1952), Hebb (1949; 1972; 1980), Dennett (1992), Edelman (1992), Humphrey (1992), and Damasio (1994).

<sup>13</sup> A theme emphasized by Hayek (1952, 147).



processes underlying, mind, and it is from some of the themes present in this work that this chapter draws its inspiration.

A Hayekian theory of mind is based upon three essential ideas. First, it emphasizes an *activities* perspective on mind, and stresses the *relational* nature of these activities and the interconnectivity of the various activities of mind. Second, it is a theory of the growth and activities of, and interactions between, *biological neural networks*.<sup>14</sup> Third, it is based upon the idea of the *feedback-based evolutionary selection of expectations* which are instantiated in enduring systems of neural network activity.

The activities perspective on mind is perhaps the dominant theme in Hayek's work on mind. This is the idea that the activities of the central nervous system are identical to the activities of the mind. In other words, and to put it crudely, the central and probably most important thesis of this work is its implicit argument that mind is what brain *does*. In other words, a human mind is the set of activities of the human nervous system and in particular, the central nervous system as manifested in the brain. This theory, then, assumes mind — as a system of activities — exists in space and time. It is in this sense that mind has “substance”; in other words, the fact that activities take place in space and over time is what gives mind whatever “substance” it has. The “substance” of mind, then, is made up of *activities*.

Now, it is of some importance to keep in mind that these activities are interconnected. An activity will perform a different task depending upon its connection to other particular activities. In this sense, then, mind is relational in that its activities and their particular connections to each other are of decisive importance in determining their effects.<sup>15</sup> Furthermore, it is the interaction between activities which determines how these activities will function within a particular mind. Activities are in this sense dependent on their environment within mind. They are also, however, dependent upon their connection with various aspects of the environment *external* to mind. In this sense, then, mind cannot be broken down into component parts unless there is some method of reintegrating these parts into a coherent whole, for such a reduction would exclude the relations between these components and hence exclude an essential aspect of mind.

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<sup>14</sup> It should be noted that this is a term of relatively recent coinage (for example, Hebb's pioneering book *The Organization of Behavior* (1949) refers to a similar concept as “cell assemblies”). Hayek tends to refer to the general systemic quality of neuronal connections, and not so much to the particular neural networks within this more general system.

<sup>15</sup> As stressed by Hebb (1949) and Hayek (1952, 52-53).

Given that under a Hayekian theory, mind is composed of a variety of activities, what is it about these activities that give mind its specific characteristics? And what is it about these activities that provides the foundation for regularity in human conduct? The Hayekian view is that the activities of mind replicate aspects of the external world through systems of neural networks and the intensities associated with these networks. Thus, the connections between events in the world external to mind are to some degree (and always imperfectly<sup>16</sup>) reproduced within mind by classifications which are associated with weights that attached to these particular aspects of the world. How, then, does this replication take place? The general idea is that simultaneous events in the environment external to mind become connected to (are capable of initiating the activities of) certain neural activities, and that certain neural activities which occur simultaneously *become* connected, and hence in time tend to occur simultaneously.<sup>17</sup> In other words, the simultaneity of events external to mind becomes replicated in the neural connections of mind when simultaneous external events initiate simultaneous neural activities which then tend to become connected *within* mind.<sup>18</sup> Thus, simultaneity in external events can lead to the formation of neural simultaneity (which, when one adopts a system's perspective, form neural networks).<sup>19</sup> Moreover, these causal connections which are replicated to a degree within mind differ from causal connections external to mind in that there are *intensities* (weights) attached to events and the connections between them, with the weights depending on how the external events map onto the ongoing processes of mind, which in turn depends upon both the quality and quantity of the processes which enter into each aspect of the internal connections.

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<sup>16</sup> See Hayek (1952, 108-109) for some of the limitations which might exist on this process.

<sup>17</sup> This is one of the most influential insights to be found in Donald Hebb's influential work, *The Organization of Behavior* (1949), a book which Hayek explicitly acknowledges as bearing a striking similarity to his own. This notion of a relationship between causal and neural connectivity underlies much of the recent literature on the neurophysiological mechanisms providing the foundations for memory and learning. For a textbook introduction to this literature, see the corresponding topics in Rosenzweig, Leiman and Breedlove (1996) and Churchland and Sejnowski (1992).

<sup>18</sup> Note that this is merely the first stage in a cascade of connected simultaneous events, some of which involve events *within* mind replicating *other events within mind*. The idea here is that some simultaneous neural activity can be viewed as forming the environment for still other neural activity; thus, simultaneous events are in this case replicated by neural connections, but these simultaneous events are themselves neural events. This process can occur over and over again, resulting in what might be thought of as an enormously complex "classification" of both the world external to an organism and aspects of its own neural mechanisms. It should be clear, then, that on this view mind is not merely a "mirror" of the external world. Rather, it is also, to some degree, a mirror of itself (in the sense that some neural networks replicate events which occur within mind, in the sense of being a re-classification, and a re-re-classification, and so on to varying degrees of complexity).

<sup>19</sup> This is also a dominant theme in the neurophysiological approach to ethology, as in Camhi (1984).

It should be stressed that although this discussion focuses solely upon events which *occur*, this does not imply that events which do not occur are of no importance. In fact, from the point of view of this work as a whole, the lack of occurrence of simultaneous events are of equal, if not, greater importance. The reason for this is that simultaneous events in the environment external to mind which are reproduced within mind form the environment *within* mind for events which are unfamiliar; hence, the creation and existence of connections also at the same time forms the environment in which a mind registers what is *not* familiar. Thus, while the replicated connections set the pattern for what is “normal”, it also sets the pattern for what is *not* normal, and hence for what is discordant with what is typically taken to be the “norm”.

Now, while the question of *how* these activities come to be joined together is an interesting one, it is a matter of more physiological detail than I will examine within this chapter. This is because the precise details of such a replication, while of great interest, are for the purposes of this study of secondary importance. What is important, however, is the insight that it might in some cases be possible for simultaneity in events external to mind to be replicated by simultaneity within mind in the form of neural networks, however connected.

The reason that this insight assumes such a great importance is its connection with evolutionary arguments, both biological and cultural, and the origins and development of mind. This thesis has viewed mind as an expectation-generating and filtering mechanism. The Hayekian view is that mind is a system in which various “expectations” (not necessarily conscious), as manifested in the interaction between neural network activities, their associated intensities, and their environments, are weeded out or reinforced by complex evolutionary selection processes of feedback loops.<sup>20</sup> This selection process over expectations (anticipations) is an ongoing activity within mind, and represents a complex interaction between the environment of an organism and the mechanisms of mind which generate, reinforce and filter out expectations.

Now, while this process works *within* the mind of single individuals, this is not the only way to view this process. Instead, one can take a more inclusive perspective, and view the evolution of groups of organisms evolving over time within their interconnected

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<sup>20</sup> This selectionist interpretation of mind has been developed by a number of authors, including (recently) Daniel Dennett (1992; 1995) and Gerald Edelman (1992). For further references, see Dennett (1991, 184; 1995, 397).

environments, including social systems. The idea is that regularity of mind evolved because there was regularity (stability, persistence, and replicability) at a more micro-level, and that this persistence came about because there was an evolved matching between the abilities and needs of the organism and the environments in which they found themselves. The regularity of mind is, then, a particular form of adaptation, in which the responses of the organism to its external environment become increasingly complex through both the short-term formation of individual- and environment-specific neural network growth which takes place within a framework which has persisted over time and over the lifespans of many individuals.

All of this is related to the theoretical concerns of this thesis. This entire work has repeatedly emphasized the importance of taking a more interactive approach to legal theory. It has stressed that regularities of conduct are grounded at an individual level, and that pre-existing cultural features must be integrated into individual conduct using mechanisms which are capable of generating regularity of conduct. Finally, it has argued that the implications of autonomous rule-following from an individual's perspective are often overlooked by legal theorizing, and that there must be a more detailed consideration of the inter-relationship between regularity at an individual level and the institutional forms whose operation is often predicated upon the continued existence of such regularity.<sup>21</sup>

## 5. Implications of the model

This model, then, attempts to provide an explanation for the regularity in human conduct which is presupposed by legal theory. On this model, individuals act on the basis of weighted "maps" which replicate to some degree regularities which occur in their environments (and within their own minds). These maps are constructed by connections being formed between activities of mind, and are subjected to evolutionary selection for their conformity with both the ongoing activities *within* a particular mind and with events external to mind which initiate their own activities within mind.

What, then, is the importance of all of this? There are three aspects of primary interest. First, the sections above have outlined a model of mind which is capable of replicating elements of the simultaneous causality present in its environment. In other words, such a

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<sup>21</sup> As has been pointed out in an earlier chapter, one can view Fuller's call for an interactionist interpretation of law as being based upon this insight.



model provides a framework under which individuals are capable of absorbing environmental regularity, and of generating and sustaining regularities of conduct. Perhaps the most important element which can be replicated is the performative-environment of a developing individual, for this can provide a foundation for the transmission and persistence of culture within individual minds. It can be argued that many of the elements of culture, and many of the abstract rules of conduct which govern individuals' performance in their day to day lives — such as those of language,<sup>22</sup> morality,<sup>23</sup> and reason<sup>24</sup> — were at least in part transmitted and embedded in individual minds in precisely this way.

This way of viewing mind stresses the inter-dependence between the growth of mind and the environment in which it was, and is, embedded. Moreover, the recognition of such an inter-dependence allows one to gain an insight into two further aspects of mind which are sometimes underemphasized by less interactive approaches. The first of these might be termed the issue of *perspective*. The second of these flows from the insight that mind embeds, to some extent, a *weighted* causal map of its environment.<sup>25</sup> This is in turn intimately related to issues of *closure*.

## 6. The importance of acknowledging the existence of perspective

The above discussion pointed towards the importance of taking into account the existence of individual perspectives and mechanisms which support their generation and preservation. The neurophysiological theory presented in rough outlines above sketches out one way in which such perspectives might develop. It is important to keep in mind that the existence of perspective within this theoretical framework flows from the existence of activities of mind in time and space (or, equivalently, and crudely, from the existence of the

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<sup>22</sup> For more on this, and the interaction between cultural and genetic evolution, see Boyd and Richerson (1985), Pinker (1995) and Dennett (1992).

<sup>23</sup> Kagan and Lamb's *The Emergence of Morality in Young Children* (1987) is a useful work for its discussions of the growth of morality in children's early years. That morality is an evolutionary adaptation is a theme that Hayek stressed more in his later writings, such as *Law, Legislation and Liberty* (Hayek 1973; 1976; 1979) and *The Fatal Conceit* (Hayek 1988).

<sup>24</sup> For arguments of this kind, see, for example, Hayek (1979, 153-157; 1988), and, more generally, Millikan (1984; 1993), though it should be noted that the latter directs most of her attention to the general argument that reason and rationality are biological adaptations, and does not focus to such an extent on more specific analyses of the methods of transmission of these adaptations (be they cultural or genetic or, as above, an essential interaction and interplay of the two forms). One might also be pointed to Margaret Donaldson's *Children's Minds* (1978), which stresses the importance of environmental context in reasoning, and highlights the substantial development of the reasoning abilities of children's minds in their early years.

<sup>25</sup> It should be pointed out that this also applies to sub-systems of mind, i.e. they embed a weighted map of their environments, some of which might be other activities of mind.

activities of brains in space-time). In other words, it is the existence of these activities at different points in space and time which provides the foundation for differences in perspective. Now, one might think this an obvious point, but that would not in fact be the case. Instead, its recognition, or lack thereof, has provided the basis for an ongoing debate taking place within the school of the materialist philosophy of mind. This debate is important for its illustration of two of the most persistent misunderstandings that one finds both about and within the neurophilosophical approach to mind.

The debate in question is between two materialist theories of mind: the *identity* (or *reductive materialist*) theory, and the *functionalist* theory.<sup>26</sup> The *identity theory* can be viewed in its most basic form as arguing that mind is identical to brain. On this view, mind is what brain *is* (and mind is assumed to be the *particular* “substances” of brain, implying that mind is inseparably wedded to the particular “substances” making up the brain). On the other hand, the theory of functionalism argues that mind is what brain *does* (implying that so long as different “substances” can replicate the functioning of the brain, they too would be considered minds). This theory of mind is in a sense closer to Hayek’s own vision, for a Hayekian theory argues that mind is a set of activities in a similar way to the functionalists. There is, however, an important difference between functionalist and Hayekian perspectives which must be pointed out.

The Hayekian perspective is that mind is a set of activities (crudely, the activities of brain) *which occur in time and space*. This is an explicit assumption of the theory, and its implications for a theory of mind are often misunderstood. One of these implications is that mind *always* embodies a perspective. The reason for this is that mind exists in space and time, and hence always knows from the perspective of *that* space-time (and hence, not from others). One of the weaknesses of a functionalist approach is that this inherent perspectivism is sometimes overlooked. Functionalism does not always acknowledge that the activities of brain must take place in space and over time. This failure to keep in mind that activities must manifest themselves in particular instantiations existing in time and space can lead to some rather unfortunate conclusions.

This can be seen by pointing out one of the implications of a typical functionalist argument. Functionalists argue that so long as one system can function in the same way as another, they are in this respect the *same* system, and hence any system that can replicate

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<sup>26</sup> For a simple overview of this position, see P.M. Churchland (1988, 26-42).

the functions of mind would be a mind. The question that arises from this is as follows: to *where* does one look to establish a *comparison* with a system which the functionalists refer to as mind? Functionalists must be implicitly, if not explicitly, referring to minds which exist in space-time when they set out the functions which other systems must replicate to be equivalent to these minds. This is not always clearly acknowledged by functionalists. Moreover, such an approach must, at least implicitly, presuppose the existence of an environment in which these functions operate, and have operated, if one hopes to be able to define these functions, and distinguish between the various capacities of mind and the roles they play in adapting an organism to its environment.

This failure to acknowledge that the minds to which they are referring exist in time and space can lead to some rather odd theoretical conclusions. A functionalist view that does not acknowledge the space-time occurrence of activities can be forced into the position of arguing that *any* isomorphic sets of functions are identical, and hence *any* set of activities which could duplicate the functions of the brain would be minds. This is relatively unproblematic. What *would* represent a problem would be the further assertion that these sets of isomorphic activities would be the *same* mind, regardless of their location in space-time. This can lead to the functionalist position denying the existence or relevance of *subjective* activities of mind.<sup>27</sup> This denial of the existence or importance of “qualia” (as they are referred to in the literature) would be based on a misunderstanding, which flows from the implicit assumption that activities do not manifest a perspective. The difficulties of the functionalist approach in this area flow from the fact that they do not recognize that the activities constituting mind are not *independent* of a perspective, but rather they take place in different minds in similar or dissimilar ways. Qualia (subjective experiences) exist *because* individual minds exist in different points in space and time, and hence individual experience may be different and personal *because* space-time existence implies that different space-time “vantage points” can produce differences in knowing, in knowledge, and in experience. Hence, the fact that I know my emotions in a way that you (who have a different space-time relationship to them) do not is merely one manifestation of the much more general phenomenon of perspectivism.

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<sup>27</sup> An elementary introduction can be found in P.M. Churchland (1988, 36-42). For a more detailed discussion of the issues, see Dennett (1992, 369-411), and for an excellent overview and critical analysis of the state of the debate, see Flanagan (1992, 61-85).

Note that the recognition of perspectivism does *not* imply that *all* knowing, knowledge and experience is “merely” or solely subjective, unless by this one means that each of these depends on the existence of a particular space-time perspective. Objective forms of knowing and knowledge are a possibility, but by “objective” one means not that knowing and knowledge occur *without* a perspective, but rather that knowing and knowledge are activities which occur in *similar* ways across minds. The space-time existence of mind, then, does not imply a radical subjectivity to *all* the activities of mind, but instead implies that *some* of the activities of mind are different across mind *because* they have a different space-time relation to what is known or to other forms of knowing and knowledge.

How, then, are these two theories of mind related to a Hayekian approach? It could be said that a Hayekian theory incorporates aspects of each into its own approach, while at the same time taking care to eliminate those errors which constitute the significant weaknesses of both the identity and functionalist theories. Thus, a Hayekian approach argues that mind exists in time and space, and hence that both the particular form in which the activities of mind manifest themselves, and their relationship to, and function within, their environment are of decisive importance in defining what mind is. The mistake underlying the identity theory of mind is that it is too particular and errs in equating mind with the *particular* substance in which these activities are realized. A functionalist critique of the identity theory would argue that another type of substance which could manifest these same activities would be a mind in exactly the same way as one based on different substances. Thus, the error of the identity theory is that it is too restricted in its attribution of the concept of mind to *particular* substances, and hence that it tends to focus on the state of being of mind rather than on mind’s activities.

Functionalist theories of mind, on the other hand, can err in discussing the isomorphic nature of different sets of functions (and of different minds) without first specifying *which* sets of functions are being compared. The functionalist approach is implicitly arguing that two systems with the same functions would be the *same* systems. From this comes the claim that any system which could replicate the functioning of a mind would itself be a mind. It is important to note, however, that there then arises the question as to what constitutes the standard of comparison. In other words, what set of activities actually characterize the mind which serves as the basis of comparison? This is not the only difficulty. It would seem that by focusing on the functioning of mind, functionalists sometimes overlook the restrictions on functioning which arise from existence (or occurrence) being in space and over time. If



this oversight occurs, functionalist theories of mind can be led into asserting that subjective events (qualia) do not exist or are irrelevant because of the implicit assumption that the activities of mind are independent of perspective, i.e. that the functioning of a system is independent of its space-time location. Essentially, this view of mind simply *assumes away* the existence of subjectivity and qualia. This is, in the final analysis, an incorrect view. Activities must always manifest themselves in particular space-times, and it is this fact which sets up the *possibility* that the “same” set of functions (“same” defined by the role they perform) can be “different” from each other (“different” in their space-time relationship to their environments, and in their space-time relationship to each other).

## 7. Intensities and closure

The second aspect of the theory of mind outlined in this chapter which is of some importance flows from the presence of intensities (weightings) associated with the activities of mind.<sup>28</sup> These are associated with the closure properties of mind, which have been alluded to at numerous points in this work. Closure within mind arises from conflicts between different ongoing activities of mind. One activity closes down another in a conflict when that activity occurs and the other does not. Within mind, then, closures are the instantiation of the implicit rank-order associated with mind’s activities. This rank-order is embedded in the evolved capacities of mind, and is generated in its particularity by the interaction between mind and its environment over the life span of the individual. One could say, then, that there are two aspects of rank-ordering which play a role in mind: at the species level and at the individual level. The individual aspects are developed during the lifetime of particular individuals, while the species level rank-ordering manifests itself in the existence of evolved activities of mind which are transmitted across generations. Species level activities manifest an *evolutionary* rank-ordering in that some of these activities have aided the organism in adapting to its environment in the past. On this way of viewing mind,

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<sup>28</sup> This stress on the intensity aspects of mind receives what is perhaps its most extensive philosophical development by Nietzsche (1958; 1968; 1968a; 1974). I would argue that it is not a coincidence that Nietzsche also stressed the *physiological* aspects of mind, a point often overlooked, or dismissed as irrelevant, by his numerous commentators. For an introductory overview of Nietzsche’s thought, see the comprehensive, if flawed, treatment by Kaufmann (1974). As an interesting counter-point to Kaufmann, and for an examination of some of the more interesting aspects of Nietzsche’s thought, see Nehamas (1986); while for an intriguing analysis of the intensity aspects of Nietzsche’s own text which are sometimes overlooked by both Kaufmann and Nehamas, see Staten (1990).

one *necessary* (but not a sufficient) condition for an attribution of evolutionary adaptedness would be the persistence of capacities over time which have contributed to the persistence of the organism in which they are presently manifested.

All of this highlights the fundamentally interactive and interconnected nature of mind, and serves to emphasize the importance of taking into consideration the inter-dependence of minds and their environments, or put another way, the way that minds grow and adapt to their environments. At the individual level, the particular regularities and rank-order of the activities of a mind grow from a variety of sources. Some of them are physiological, others are cultural. There is an intimate interplay between these two factors, and in a sense the genetic aspects of mind provide the necessary, but not the sufficient, conditions for the development of this rank-ordering. Neuropsychology uses the term *functional validation* to describe the process whereby certain events external to mind must interact with the genetic aspects of mind if mind is to develop certain specific capacities.<sup>29</sup> This is a useful notion in that it emphasizes the feedback and interaction between the events in the environment external to mind and those within mind. The physiological aspects of mind provide a foundation upon which more particular aspects of mind can grow, depending on the events which activate particular genetic components. And it is this growth which provides the foundations for individualized perspectives.

### 8. Different types of closure, different ways of viewing the world

All of this is related to the issue of closure. The theme of earlier discussions of this notion was that the type of closure employed in reasoning has an important role to play in determining how one views the world. The discussion of this chapter will, for the moment, take a slightly more philosophical bent. To see how each form of closure has different implications for reasoning, consider for the moment a famous paradox of reasoning, the *liar's paradox*. This runs as follows. Epimenides, a Cretan, states "all Cretans are liars". The paradox arises for the following reason: if in saying this, Epimenides is telling the truth, then he is a liar (for he is a Cretan). If on the other hand he is lying, then it would follow that he is telling the truth.

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<sup>29</sup> See Kolb and Whishaw (1996, 500).

Now, it can be argued that this statement is, or is not, a paradox depending upon the approach to reasoning which one takes. Consider an all-or-nothing approach. On this view, the question is laid down as follows: is Epimenides' statement a lie, or is it not a lie? On this way of looking at the statement, Epimenides either lies, or does not lie. This is an *either/or* way of looking at the world, in which the attempt is made to categorize Epimenides' statement into two mutually exclusive states of being. This is, in the language of logical analysis, a *bivalent* approach to reasoning.

Now consider a matter-of-degree approach. On this way of looking at Epimenides' statement, the world of possibilities is not divided into two mutually exclusive states of being (lying or not lying), but is rather composed of a variety of intertwined shades of each. This is a *multivalent* approach to reasoning. This view restricts the universality of an all-or-nothing approach, and attempts to take into account the "fuzziness" which seems to accompany the complexity of actual (as opposed to theoretical) affairs. In practical life, would it make sense to claim that *all* the statements of *all* Cretans are lies? Or, is it not much more familiar — and more meaningful — to think of the proposition as meaning that in many *important* (i.e. "weighty") cases, Cretans lie? Or that the universal statement is, in an important sense, an approximation to a much more complex underlying situation?

On a matter-of-degree view, what becomes of great importance is the *weighting* which is attached to statements which are made. This is a view dedicated to the balancing of the different and often competing claims made on our judgment. Now, it is important to keep in mind some of the implications of such a view, and in particular, the areas of incompatibility between the all-or-nothing and matter-of-degree approaches to viewing the world. Consider the liar's paradox: a matter-of-degree perspective classifies the liar's paradox in a different way from the all-or-nothing perspective. Under the former, it can be said that the Cretan lies to a degree and does not lie to a degree *at the same time*. From the perspective of an all-or-nothing view, this is contradictory, for X and not-X cannot be the case at the same time. But on a matter-of-degree perspective, however, X and not-X can be the case at the same time. It would be a confusion, then, to claim that X and not-X being the case at the same time is somehow *inherently* contradictory, for this is so only if an all-or-nothing approach is implicitly privileged as the only one which is suitable to view the world.

There is another aspect to this discussion which should be mentioned, but which seems to have an elusive quality. As mentioned above, an all-or-nothing approach is a dichotomization which splits the world into X and not-X, into what is the case and what is

not the case. What might not be apparent about this bivalent way of looking at the world is its implicit connection to minimal conditions. That is, an all-or-nothing perspective is better adapted to (has an evolutionary association with) circumstances in which minimal conditions are being considered. The reason for this, which has been discussed in earlier chapters, is that the classifications over such conditions are more likely, for evolutionary reasons, to have a stronger intensity weighting, and hence to be able to override alternative classifications to a greater degree. A matter-of-degree approach, on the other hand, is more likely to be associated with conditions which build upon the presupposition that these minimal conditions have already been fulfilled. This is an approach which is amenable to considerations of the overlap between alternatives and to the complexities which have been built upon a foundation of necessary conditions which have already been fulfilled. An all-or-nothing approach to the liar's paradox, for example, implicitly focuses on the minimal conditions of existence or non-existence, while a matter-of-degree perspective implicitly focuses on the overlap which exists between alternative states of being. The all-or-nothing perspective, then, is implicitly focused on issues concerning minimal conditions, while the matter-of-degree perspective emphasizes issues concerning the complexity which builds upon, and presupposes the satisfaction of, minimal conditions.

It is perhaps obvious that either perspective, if overextended, has the potential to become a rather misleading window on the world. An all-or-nothing perspective that focuses exclusively on minimal conditions, which stresses the lack of conflict between necessary conditions, and which emphasizes the factual nature of analyses (for if there are facts to consider, they will be defined under the all-or-nothing classifications associated with necessary conditions), subtly ignores the issues associated with trade-offs, with competing or conflicting alternatives, and with considerations of alternative, but incompatible, potentialities. Similarly, a matter-of-degree perspective which focuses exclusively on potentiality, alternatives and conflict would ignore the necessary conditions which all potentiality must satisfy if it is to become actuality. In my view, one must combine these two perspectives. It is important to realize that a focus on the necessary conditions of the actuality that does exist should not preclude a consideration of the potentiality that such conditions are capable of supporting. Conflicts between alternatives do exist and should be taken into account, and it is important to focus on potentiality both for what it must, and for what it could, become. It is also important to keep in mind, however, that potentiality



depends intimately on what is the case, and that there might be certain necessary conditions which must be fulfilled if potentiality is to become actuality.

### 9. Implications for legal theory: conflict, closure and reasoning

All of this is related to the differences between different forms of reasoning, as was discussed in an earlier chapter. Turn for the moment, then, to a consideration of deductive and non-deductive reasoning and their relationship to the issue of closure.

It is especially important to keep the existence of classifications *and* intensity in mind when one is considering the different frameworks for reasoning which were considered earlier in the thesis. As was argued there, one of these forms of reasoning — deductive reasoning — seems to presume away all conflict and simply assume that conflicts have been resolved externally to the sphere of reasoning. This is unproblematic so long as it is understood that the sphere of deductive reasoning is grounded upon a set of conflicts which have been resolved in setting up the sphere *within* which deduction is valid. Deduction can fall into error when it fails to take this into consideration or when it is applied in environments in which it is inappropriate. In particular, if one attempts to resolve conflict by appealing to deduction, one must realize that this will only be a useful exercise in certain situations. If deduction is applied to areas in which the participants to a conflict share certain classifications and their intensities in common, then there can be a sphere delimited under which deduction from premises using rules of deduction makes sense. Deduction in this environment does not resolve conflicts by generating the sphere within which the rules of deduction may be applied. Rather, it is the application of the rules, based upon a shared set of classifications, which resolves disputes.<sup>30</sup>

However, deduction is not always so useful. Deduction is not applicable to environments where there are equally balanced conflicts among classifications. If a common core of all-or-nothing classifications does not exist, then deduction would have to *generate* them, and it is the act of generation which in effect “resolves” the dispute by imposing all-or-nothing

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<sup>30</sup> There is, it seems, an uneasy relationship between deductive reasoning and minimal conditions. On the one hand, rules of conduct which are based on minimal conditions are easier to formalize, as they are based on all-or-nothing closures, for the reasons outlined in earlier chapters, and above. On the other hand, the justifications for the functions of these rules is, in many cases, based on values which are abstract, and in many cases poorly understood or consciously not known. Thus there emerges an essential tension between the ease of formalizing abstract rules of conduct, and the difficulty in appreciating the roles that they play and the values they support.

classifications on a situation where no such commonly held all-or-nothing classifications were presumed to exist.

The structure of deductive reasoning, then, is that of a two-step procedure. In the first stage, at which all-or-nothing classifications are presumed to underlie classifications, one first recognizes a set of rules which delimit the boundaries of the investigation. The closures at the first stage both constitute the rules of the investigation and close down their reference. These rules are then rank-ordered in importance, presupposing that rules have been defined at a first stage. This perspective presupposes that a core of agreement exists, that it can be used to delimit both the rules which govern an investigation and their scope, and that these rules are then rank-ordered such that conflicts are resolved. On this view, one can see how “facts” and “values” become separated — “facts” are first-stage shared classifications, while “values” are second-stage elements, related to the rank-ordering aspect of reasoning.

Such a vision of reasoning is not without its competitors. As I have argued in a previous chapter, non-deductive reasoning turns the focus of attention onto the rank-order stage of judgment, and in particular onto its unarticulated aspects. This change of focus brings to light an interesting issue concerning the relationship between a rule which is constituted at the first-stage and the force it carries (its rank-order) at the second stage. Consider the following. If one assumes that rules are constituted initially by closures of certain weights, then the question which must be asked is how do these closures (and implicit weighting) differ from the weightings which are used to rank-order the rules in the second stage?

The answer is, I think, that they do not differ — they are both based on a general framework of values which generate the force of different rules and hence in a sense *constitute* the weights. If one accepts this, then one might also argue that one should collapse the two-stage division (of formulating rules and then rank-ordering them) into a single stage. This single stage, then, generates rules by considering the various trade-offs and conflicts between all potential rules which could govern a situation. A single-stage perspective, then, focuses on matter-of-degree conflicts and emphasizes the ongoing conflict embedded in rules. It also stresses the importance of recognizing that balances always have to be made and that a dominant rule will necessarily restrict a dominated rule.

Is there, then, a conflict between the two ways of viewing reasoning? It is submitted that the two perspectives are not incompatible, but that they *can* be if they are overextended. If it is held that there are no areas of commonality — none at all — then there is unintelligibility *between* individuals, for no overlap of perspectives implies no overlap of shared meaning.

On this view, reasoning can come to be viewed as just another form of power, lacking any authority over those who do not share its foundational presuppositions. On the other hand, if it is held that there is commonality, it is important to acknowledge that it will be limited by actual subjective differences between individuals, and that this implies, in situations of complexity, that commonality will often be abstract and negative, in the sense of shared restrictions over different particular perspectives. If this acknowledgment is not made — if “commonality” is overextended to include those aspects which are not commonly held, but which are rather individual- or group-specific — then paternalistic arguments might be made, under which some make judgments for others, based on their “shared” interests, over areas where no such commonality exists. In such a scenario, the claim of “commonality” is used as the justification for some controlling others, in that particular individuals have no privileged relationship to these shared interests (as they do to their more idiosyncratic, person-specific, interests).

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